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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MOSHE TAL, INDIVIDUALLY, TAL TECHNOLOGIES, INC.,AND T'S FAMILY LIMITED PARTNERSHIP, PETITIONERS

v.

DCR FUND I, L.L.C. BANK ONE, N.A., AND BRIDGEVIEW BANK, N.A.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a mortgagor whose property was taken by foreclosure because of alleged defaults by other mortgagors and who already has dismissed without prejudice its state court action against the foreclosing bank now barred by the *Rooker-Feldman* doctrine from joining those other mortgagors in a third-party complaint in federal court against the foreclosing bank for its alleged illegal foreclosure?

2. Does the principal shareholder of small, closely held family corporations who is not an attorney but now owns all of the corporate assets by assignment possess sufficient standing to proceed *pro se* in this litigation both in his own behalf and for the corporate defendants?

3. Did the court of appeals violate the principles of *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) and its progeny by wrongly construing Oklahoma law to deny the petitioner's claims that the parties modified their written loan agreement by their conduct and that their agreement as executed demonstrated that the petitioners were not in default?

RULE 29.6

The corporate petitioner Tal Technologies, Inc. ("TTI") is an independent Oklahoma corporation with no parent company. The petitioner TS Family Limited Partnership ("TSFLP") is an Oklahoma limited partnership. The majority of TTI's stock (75%) is held by Tal-Solomon Family Trust ("TS Trust") and the balance (25%) is owned by Gustavo Chacin ("Chacin") of Venezuela. The TSFLP partners are the petitioner Moshe Tal ("Tal") together with his immediate family members. Tal is a trustee and manager of TS Trust. TS Trust also owns the stock of Bricktown Grain Elevator Company ("BGE").

The petitioner Tal is also the holder by valid assignments of each of the corporations' (TTI and BGE) claims in this litigation. He also owns by valid assignments, notes and quitclaim deeds the assets and properties of the two corporations TTI and BGE.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 7

REASONS FOR GRANTING THE PETITION 18

CONCLUSION 30

APPENDIX

Circuit Court Opinion 1a
District Court Order (12/6/04) 21a
District Court Order (5/17/04) 42a

TABLE OF AUTHORITIES

Page

CASES

ALDEN V. MAINE, 527 U.S. 706 (1999) 27
ALLEN FARMS, INC. V. BROCE CONST. CO. INC., 134 P.3D 852, 855(OK. CIV. APP. 2005) 29
BIG JOHN'S LUMBER CO. V. CITY BANK, 901 P.2D 832, 833-834(OK. APP. 1995) 29
BRADBURY V. DENNIS, 310 F.2D 73,74(10TH CIR. 1962) 26
BROWN V. FOUNDERS BANK AND TRUST CO., 890 P.2D 855, 863(OK 1994) 29
BUSH V. GORE, 542 U.S. 692 (2000) 26, 28
CITY OF OKLA. CITY V. CITY URBAN RENEWAL AUTHY., 988 P.2D 901, 904-905(OKLA 1999) 10
COMMERCIAL AND RAIL ROAD BANK V. SLOCUMB, 39 U.S.(14 PET.) 60, 65(1840) 24
DAILY INCOME FUND, INC. V. FOX, 464 U.S. 523, 528-529(1984) 26
DISTRICT OF COLUMBIA COURT OF APPEALS V. FELDMAN, 460 U.S. 462(1983) 16, 18
ERIE R. CO. V. TOMPKINS, 304 U.S. 64(1938) 26, 27, 28
EX PARTE YOUNG, 209 U.S. 123, 167-168(1908) 22
FEDERACION DE MAESTROS DE PUERTO RICO V. JUNTA DE RELACIONES DEL TRABAJO DE PUERTO RICO, 410 F.3RD 17, 23-25(1ST CIR. 2005) 20
EXXON MOBIL CORP., INC. V. SAUDIBASIC INDUSTRIES CORP., 544 U.S. 280(2005) 18, 19
FELDER V. CASEY, 487 U.S. 131, 151(1988) 26
FERENS V. JOHN DEERE CO., 494 U.S. 516, 524(1990) 27
GRESHAM PARK COMM. ORGAN. V. HOWELL, 652 F.2D 1227, 1235-1236(5TH CIR. 1983) 22
GUARANTY TRUST CO. V. YORK, 326 U.S. 99, 109(1945) 26
HANNA V. PLUMER, 380 U.S. 460, 468(1965) 28
HARRIS COUNTY COMM'RS COURT V. MOORE, 420 U.S. 77, 88-89(1975) 22
HARRISON V. WAHATOYAS, L.L.C., 253 F.3D 552, 556-

557(10TH CIR. 2001) 24
KNITTEL V. SEC. STATE BANK, MOORELAND, 593 P.2D 92, 96(OK. 1979) 29
LANCE V. DENNIS, 546 U.S. 459(2006) 20
MATTER OF HOLLIDAY'S TAX SERVICES, INC., 417 F. SUPP. 182-183(E.D.N.Y 1976) 25
MATTER OF HOLLIDAY'S TAX SERVICES, INC., SUPRA. KAMP V. IN SPORTSWEAR, INC., 335 N.Y.S.2D 306, 306(1972) 25
MEREDITH V. WINTER HAVEN, 320 U.S. 228, 238(1943) 28
MICHAEL O. LEAVITT V. JANE L., 518 U.S. 137, 144-145(1996) 29
MITCHUM V. FOSTER, 407 U.S. 225, 242-243(1972) 22
OKLA. EX REL. TAL V. CITY OF OKLA. CITY, 19 P.3D 268(OKLA. 2000), CERT. DENIED, 534 U.S. 814(2001) 10
OSBORN V. BANK OF THE UNITED STATES, 22 U.S.(9 WHEAT.) 738, 830(1824) 24
PHOENIX MUTUAL LIFE INSURANCE CO. V. RADCLIFFE ON THE DELAWARE, INC., 266 A.2D 698, 702(PA 1970) 25
PLUMBING V. TULSA RIG, REEL & MFG., 533 P.2D 980, 983(OK.1975) 29
RHOADES V. PENFOLD, 694 F.2D 1043, 1047(5TH CIR. 1983) 22
ROOKER V. FIDELITY TRUST CO., 263 U.S. 413 (1923) 16, 18
ROWLAND V. CALIFORNIA MEN'S COLONY, 506 U.S. 194, 201-203(1993) 24
RUHLIN V. NEW YORK LIFE INS. CO., 304 U.S. 202, 208-209(1938) 28
SALVE REGINA COLLEGE V. RUSSELL, 499 U.S. 225, 226(1991) 27, 28
SIX COMPANIES V. HIGHWAY DIST., 311 U.S. 180, 188(1940) 28
SWAIN V. SEAMANS, 76 U.S. 254, 273-274(1869) 29
TAL ET AL. V. HOGAN ET AL, 453 F.3D 1244(10TH CIR. 2006) 10, 23
TITUS V. WALLICK, 306 U.S. 282, 290(1939) 26

TRAKTMAN V. CITY OF NEW YORK, 582 N.Y.S.2D 808, 809(APP.) 25
U.S. POLYCON CORP. V. U.S., 43 FED. CL. 11, 14(CT CL. 1999) 24, 25
UNITED STATES V. KIMBELL FOODS, INC., 440 U.S. 715, 730(1979) 28
UNITED STATES V. PRIORITY PRODUCTS, INC., 615 F.SUPP. 593, 596(CIT 1985) 25
WEST V. A.T. & T. CO., 311 U.S. 223, 236-237(1940) 28
WILLAPA TRADING CO. V. MUSCANTO, INC., 727 P.2D 687(WASH.APP.1986) 25
WILLHEIM V. MURCHISON, 206 F. SUPP. 733, 735(S.D.N.Y 26

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1257(a) 2
28 U.S.C. § 1332 20
28 U.S.C. § 1332(d)(2)(A) 2
28 U.S.C. § 1343(a)(4) 3
28 U.S.C. § 1654 3
28 U.S.C. § 1738 19
28 U.S.C. § 2101(c) 1

RULES

FED. R. CIV. P. 17(a) 3, 26

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Tenth Circuit in *DCR Fund I, LLC v. TS Family Limited Partnership et al.*, Docket No. 05-6232, decided January 24, 2008, and reported at 2008 U.S. App. *LEXIS* 1574, affirming the District Court's grant of summary judgment in favor the respondent banks, is set forth in the Appendix hereto(App. 1-20).

The unpublished Order of the District Court for the Western District of Oklahoma, in *DCR Fund I, LLC v. TS Family Limited Partnership et al.*, Docket No. 03–772-L, filed December 6, 2004, granting the respondent banks' motion for summary judgment, is set forth in the Appendix hereto(App. 21-41).

The unpublished Order of the District Court for the Western District of Oklahoma, in *DCR Fund I, LLC v. TS Family Limited Partnership et al.*, Docket No. 03–772-L, filed May 17, 2004, is set forth in the Appendix hereto(App. 42-50).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court's grant of summary judgment in favor the respondent banks was entered on January 24, 2008(App. 1-20).

This petition for writ of certiorari is filed within ninety (90) days of January 24, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article III, § 1:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari....

28 U.S.C. Section 1332(d)(2)(A):

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interests and costs, and

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is a class action in which ---- (A) any member of a class of plaintiffs is a citizen of a State different from any defendant....

28 U.S.C. Section 1343(a)(4):

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. §1654:

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Fed. R. Civ. P. 17(a) & (b):

(a) Real Party in Interest.

(1) ***Designation in General.*** An action must be prosecuted in the name of the real party in interest....

....

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized....

15 O.S. [Oklahoma Statutes] §§140A & B:

Credit agreements-Actions to enforce and seek damages-limits to actions on oral agreements.

A. As used in this section:
1. "Credit agreement" means an agreement by a financial institution to lend money, extend credit or otherwise make any other financial accommodation....
....
4. "Borrower" means a person who seeks a credit agreement with a lender or financial institution....
B. No lender or borrower may maintain an action to enforce or seek damages for the breach of any term or condition of [a] credit agreement having a principal amount greater than Fifteen Thousand Dollars ($15,000.00), unless such term or condition has been agreed to in writing and signed by the party against whom it is sought to be enforced or against whom damages are sought.

15 O.S. §237:

A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.

18 O.S. §1015:

GENERAL POWERS

In addition to the powers enumerated in Section 16 of this Act, every corporation, its officers, directors and shareholders shall possess and may exercise all the powers and privileges granted by the provisions of the Oklahoma General Corporation Act or by any other law or by its certificate of incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.

18 O.S. §1016:

SPECIFIC POWERS

Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to:

....

2. Sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name;

....

4. ...[S]ell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, all or any of its property and assets, or any interest therein, wherever situated....

46 O.S. §49:

> Notwithstanding anything herein to the contrary, the mortgagee may at any time prior to the conduct of any sale under this act, terminate any power of sale proceeding and pursue judicial foreclosure in accordance with the procedures provided for the foreclosure of mortgages.

Oklahoma Code of Civil Procedure:

§2005.2(C)2:

> [When the withdrawal of counsel leaves a party unrepresented,] If no entry of appearance is filed within thirty (30) days from the date of the order permitting withdrawal, then the unrepresented party, other than a corporation, is deemed to be representing himself or herself and acting pro se....

§2025. Substitution of Parties.

> ....
> C. TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party....

STATEMENT

The petitioner Moshe Tal ("Tal" or "the petitioner") is the founder and president of the corporate petitioner Tal Technologies, Inc. ("TTI"), an independent Oklahoma corporation with no parent company. Tal is also the founder and president of another independent Oklahoma corporation, Bricktown Grain Elevator Company ("BGE").

The petitioner TS Family Limited Partnership("TSFLP") is an Oklahoma limited partnership. The TSFLP partners are the petitioner Tal together with his immediate family members. The majority of TTI's stock (75%) is held by Tal-Solomon Family Trust ("TS Trust") and the balance (25%) is owned by one Gustavo Chacin of Venezuela. Tal is a trustee and manager of TS Trust. TS Trust also owns the stock of BGE. By notes and quitclaim deeds, both of the corporate entities TTI and BGE have validly assigned to Tal all of their assets and properties as well as their claims in this litigation. In addition, members of both TSFLP and TS Trust voted to assign to Tal all of their interests and authorized him to represent and protect their interests in any legal action.

In 1989, Tal and his limited partnership TSFLP purchased a five-acre parcel of land containing 30,000 square feet of industrial buildings at 200 S.E.3rd Street, in South Bricktown, Oklahoma City, taking title to the property in the name of TTI. Tal uses the property to manufacture fuel additives which he invented and sells under the trade name "TK7."

By 1993, the residents of Oklahoma City had approved a sales tax to fund the redevelopment of the south side of Bricktown under the auspices of the Oklahoma City Metropolitan Area Projects Program, a redevelopment plan which included a man-made canal adjacent to TTI's property. Thereafter, in 1995, Tal and his limited partnership TSFLP purchased a second parcel of adjacent land in South Bricktown located at 300 S.E. 4th Street containing old grain silos.

Tal created BGE in order to hold title to this second property in Bricktown and BGE promptly converted the silos located there into a wall climbing gym, planning to develop the rest of the property into a sports and entertainment complex, all consistent with the City's amended redevelopment plan for Bricktown. In order to further develop its property at 200 S.E. 3rd Street adjacent to the Bricktown Canal, TTI obtained a loan from the respondent Bank One, N.A. ("Bank One") for $250,000.00, one secured by a three-acre portion of TTI's five-acre parcel of land at 200 S.E. 3rd Street and guaranteed by Tal personally as well as the limited partnership TSFLP(App. 4).

The $250,000.00 note executed by TTI and Bank One and guaranteed by Tal and TSFLP provided for a maturity date of November 8, 2001, with 59 monthly payments(App. 4). The mortgage further provided that upon the borrower's breach, Bank One may declare all sums immediately due and payable without further demand; The guaranty agreements of Tal and TSFLP provided that any amendments or modifications must be in writing(App. 5).

The fact that this loan was secured by just three acres of the 5-acre parcel at 200 S.E. 3rd Street in Bricktown left about 1.8 acres of canal-front property freed up for a multimillion dollar development along the canal which Tal and his joint venturer were planning. These efforts by Tal and TTI to develop their canal-front property consistent with the City's amended redevelopment plan were soon frustrated by the City itself.

First, in March of 1997, the City brought an action to condemn 1.4 acres of TTI's property which fronts the canal running into Bricktown. The City claimed that it wanted the land for public parking, public recreation and parks, all uses challenged by Tal and TTI. By October 2, 1997, however, a modified condemnation order issued from the State court. Tal and TTI were paid just $50,000.00 for their 1.4-acre parcel under the condemnation order. The City then transferred the land to the Urban Renewal Authority for eventual sale for a price "not less than the actual fair market value of [the] property."

Second, the City then solicited proposals from developers interested in obtaining the Bricktown redevelopment contract. Tal and his corporation applied for the contract but the City Council eventually awarded the redevelopment contract to TMK/Hogan which thereupon paid the Urban Renewal Authority $3.3 million for TTI's1.4-acre condemned parcel.

In the wake of these actions by the City and its Urban Renewal Authority in settling the redevelopment of Bricktown, conduct which Tal and TTI characterized as fraud and "bid-rigging," Tal

together with the organization Taxpayers Against Ripoffs (TAR) began in State court a *qui tam* action in 1999 seeking to have the City (and its Urban Renewal Authority) file suit to have the redevelopment contract with TMK/Hogan either rescinded or declared void. Tal and TTI also sought by motions to have the earlier condemnation order declared void based upon newly discovered evidence of fraud on the City's part and the blatant non-public use of its eminent domain power.

Neither of these efforts by Tal and TTI challenging the City's award of the redevelopment contract to TMK/Hogan was successful. They were twice denied the right to intervene in the City's own declaratory judgment action to have the award validated, see *City of Okla. City v. City Urban Renewal Authy.*, 988 P.2d 901, 904-905(Okla. 1999); *Okla. ex rel. Tal v. City of Okla. City*, 19 P.3d 268(Okla. 2000), *cert. denied*, 534 U.S. 814(2001). In addition, the State court twice denied their motions to reconsider the condemnation order on the basis of newly discovered fraud, rulings which were affirmed on appeal. *City of Oklahoma City v. Tal Techs., Inc.*, Case No. 94,045 at 5 n.3(Okla. Civ. App. July 31, 2001), *cert. denied*, 535 U.S. 987(2002).

Moreover, when Tal and TTI then brought a civil action against TMK/Hogan and the director of the City Urban Renewal Authority in the federal district court for the Western District of Oklahoma in 2002 alleging *inter alia* conspiracy, fraud and violations of RICO and the Sherman Anti-Trust Act in condemning the Bricktown property, their second amended complaint making these claims was dismissed, a ruling eventually affirmed on appeal. See *Tal et al. v. Hogan et al*, 453

F.3d 1244(10th Cir. 2006). However, the federal district court dismissed *without prejudice* Tal's *state* claims against TMK/Hogan and the director of the City Urban Renewal Authority for tortious interference with their business relations and conspiracy to obtain the condemnation judgment by fraud. Consistent with 12 O.S. §§ 100 *et seq.*, Tal, on September 27, 2004, refiled his state claims in the state court for Oklahoma County (No. CJ-04-7943). This suit was first dismissed by the trial judge, a dismissal which was then reversed by the Oklahoma Supreme Court by an order which disqualified the trial judge (Robertson, J.) and remanded the case to the trial court for hearing by another judge from another county. *Tal v. Robertson*, Appeal No. 103853.This suit is still pending.

In the meantime, the City's interference with Tal's business properties in Bricktown starting in 1997, its unlawful condemnation proceeding in 1998 and its invalid award of the Bricktown redevelopment contract to TMK/Hogan caused substantial financial loss to Tal and his related companies. By mid-1998, Tal was behind on payments for the Bank One loan and he was lacking sufficient funds for BGE to complete the renovation of its Bricktown property at 300 S.E. 4th Street.

In order to complete BGE's partial renovation of its property at 300 S.E. 4th Street, BGE obtained a $75,000.00 loan from the respondent Bridgeview's predecessor, Metro Bank, N.A. ("Metro") on January 27, 1999. As security, Metro was given a first mortgage on BGE's property at 300 S.E. 4th Street in Bricktown and a second mortgage on TTI's property at 200 S.E. 3rd Street. Tal personally, TSFLP and TTI guaranteed the

payment of this loan.

Furthermore, in order to avoid foreclosure by Bank One on the property at 200 S.E. 3rd Street, Tal and Bank One agreed that for a payment of $60,000.00, Bank One would defer from collecting loan payments by TTI until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment. To fund this agreement, TTI borrowed $75,000.00 from Metro on March 30, 1999. As security, Metro was given a third mortgage on TTI's property at 200 S.E. 3rd Street and a second mortgage on BGE's property at 300 S.E. 4th Street.

On June 28, 1999, TTI obtained another loan from Metro in the amount of $100,000.00 together with a line of credit of $330,000.00 to be paid off upon the conclusion and collection by TTI of a compensation award in its condemnation case against either the City and TMK/Hogan, whichever suit is concluded first. Tal and BGE guaranteed this loan and Metro was also given as security an additional (third) mortgage on TTI's property at 200 S.E. 3rd Street and an additional third mortgage on BGE's property at 300 S.E. 4th Street.

In the latter part of 2000, Metro was taken over by the respondent Bridgeview Bank of Illinois ("Bridgeview"). Bridgeview immediately capped TTI's line of credit on its loan to$150,000.00. During March and April of 2001, financial failures by Tal's wholesale distributor and its largest customer together with the diagnosis of a rare form of nerve cancer for Tal's wife led to difficulties by Tal and TTI in paying Bank One's

loan. When contacted by Bank One about this, TTI informed Bank One's loan officer about its agreement on March 30, 1999, that Bank One would defer from collecting loan payments by Tal or TTI until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment.

Bank One took no further action against Tal or TTI. However, on August 12, 2002, it sold the note and assigned its interest in the mortgage and guaranty agreements to the respondent DCR Fund 1, L.L.C. ("DCR") "as is, where is, [and] with all faults"(App. 6).

At the same time, Bridgeview proceeded to consolidate its loans to Tal and TTI in May of 2001 in the amount of $200,000.00(App. 7;22-23). Tal's largest customer, Gulf Refinery in Puerto Rico, was consistently 2-3 months late in making payments to TTI; Metro and then Bridgeview allowed TTI to make late payments on its consolidated note consistent with this late pattern of payments by Gulf Refinery without objection for two years. BGE's payments to Bridgeview, on the other hand, were always timely.

When DCR made demand upon Tal and TTI for payments under the former Bank One loan, Tal and TTI reminded DCR of their oral agreement with Bank One that it (and therefore DCR) would defer from collecting loan payments by Tal or TTI until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment(App. 6). Without any writing to evidence this agreement, DCR formally notified Tal, TTI and TSFLP of their default under the note, demanding full

payment of $233,076.97 plus future interest.(App. 6).

Without any payment forthcoming and asserting diversity of citizenship as its jurisdictional peg, DCR began this civil action on June 5, 2003, in the federal district court for the Western District of Oklahoma against Tal, TTI and TSFLP to collect on the note and to foreclose on the mortgage on TTI's property at 200 S.E. 3rd Street(App. 3-4;21-22). In addition to these defendants, DCR named Bridgeview as a party-defendant because of its interest in the property by virtue of its previous loans to TTI and BGE(App. 4;22-23).

In their answer and counterclaim against DCR as well as in their third-party action against Bank One, Tal, TTI and TSFLP all claimed that they had an oral agreement with Bank One deferring payment under the loan "until the Tals received a money judgment from one of the two pending lawsuits related to the condemnation issue"(App. 22). In their third-party action against Bank One, they claimed that Bank One sold the note to DCR without informing DCR of the oral deferral agreement(App. 22).

Bridgeview answered DCR's complaint and cross-claimed against Tal and TTI for defaulting on its May, 2001 consolidation loan, a default which it claimed involved a mortgage on portions of TTI's property at 200 S.E. 3rd Street which did not implicate DCR's loan(App. 7;23). Concurrently, Bridgeview sought to begin non-judicial foreclosure proceedings of its mortgage on BGE's property at 300 S.E. 4th Street pursuant to its claimed rights under the consolidation loan documents of May 2001(App. 7).

On October 20, 2003, Tal sought an injunction in DCR's civil action to stop Bridgeview's non-judicial foreclosure proceedings at 300 S.E. 4th Street claiming that Oklahoma law does not permit such non-judicial proceedings once a judicial foreclosure is pending, as here, and that the attempted foreclosure here is connected to this case because the foreclosure seeks to pay off TTI's loan to Bridgeview which is the very subject of its cross claim in this action. The district judge, however, denied Tal's motion because *BGE* was not a party to this action and its property at 300 S.E. 4th Street was not subject to this suit(App. 7-8;23)(emphasis supplied).

In the wake of this ruling, Tal began a civil action in the Oklahoma County District Court seeking injunctive relief to prevent Bridgeview's non-judicial foreclosure proceedings. *Tal v. Bridgeview*, CJ-03-8993(Oklahoma County). Tal's amended petition in State court asserted state law claims against Bridgeview for conversion, tortious interference with business relations, unlawful foreclosure of BGE property, abuse of process and conspiracy(App. 47). The State court judge refused to provide Tal with injunctive relief and BGE's property at 300 S.E. 4th Street was sold on October 28, 2003, to a third party for $258,000.00(App. 7;45).

Nonetheless, Tal then sought to have the federal district court reconsider or vacate its earlier denial of injunctive relief to prohibit Bridgeview's non-judicial foreclosure sale(App. 7-8;45). On May 17, 2004, the district court denied Tal's motion(App. 42-50). Relying on Bridgeview's affidavits, it ruled that it could not enjoin a sale of property which had already taken place;

that BGE's property at 300 S.E. 4th Street was not part of this federal litigation involving DCR's collection action on the Bank One note and mortgage with Tal and TTI even though Bridgeview's loan documents gives it the right to foreclose upon *other* properties owned by Tal which were *not* part of the loan; and that it did not have subject matter jurisdiction to invalidate the sale of the BGE property(App. 46).

Moreover, because Tal was asserting state law claims against fellow citizens of Oklahoma, diversity (of citizenship) jurisdiction was not present despite the fact that Bridgeview's headquarters were located in another state (Illinois) and that Bridgeview was subject to federal banking laws in any event(App. 46-47). As it concluded, "[t]he claims that Tal seeks to raise are simply not so related to the DCR case that they are part of the same case or controversy"(App. 48). At no time did the district judge rely upon the *Rooker-Feldman* doctrine to reach this result.. The doctrine, enunciated by this Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462(1983), holds that lower federal courts lack jurisdiction to provide appellate review of state court judgments or claims "inextricably intertwined" with state court judgments.

On June 28, 2004, Tal dismissed without prejudice his State court suit against Bridgeview. *Tal v. Bridgeview*, CJ-03-8993(Oklahoma County). On August 2, 2004, Tal and his related entities then filed a motion in this federal action seeking to add BGE as a third-party plaintiff to their third-party complaint and allege claims against Bridgeview for conversion, tortious interference with business relations, unlawful

foreclosure of BGE's property, abuse of process and conspiracy.

On December 6, 2004, the district court—again without relying upon *Rooker-Feldman*—denied the motion because "the BGE property ha[s] not been considered part of this action"(App. 37). At the same time, the district judge entered summary judgment in favor of DCR and Bridgeview inasmuch as "[t]he Tal defendants have not proved any of their affirmative defenses or counterclaims against DCR or [in] their third-party action against Bank One"(App. 37). Specifically, the district judge ruled that any oral agreement which Tal and his corporate entities may have had with Bank One modifying their written agreement was barred as a matter of law by the parol evidence rule and the loan's integration clause; that Tal's evidence of an executed oral agreement modifying the written loan agreement was inadmissible in any event under Oklahoma's statute of frauds; and that there was insufficient evidence of equitable estoppel, conspiracy or duress(App. 29-35).

The petitioners appealed and on January 24, 2008, the court of appeals unanimously affirmed the lower court's grant of summary judgment in favor of DCR and Bridgeview(App. 1-20). It ruled that any reliance by Tal and his related corporate entities upon an oral agreement to vary the terms of the written loan documents was "conclusively barred by Oklahoma statute;" that there was no clear and convincing evidence of an executed agreement otherwise; and that the alleged oral agreements were never fully executed in any event(App. 12-15). In addition, the court of appeals ruled that Tal's attempts to bring Bridgeview

and its unlawful foreclosure procedure into this litigation by amendment of his third-party complaint was barred by the *Rooker-Feldman* doctrine (App. 15). Finally, it determined that Tal (who is not an attorney but who is proceeding *pro se*) has no right to represent his corporate entities TTI or TSFLP in this action(App. 16).

The petitioners have now brought to this Court their petition seeking a writ of certiorari to the Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Expands The *Rooker-Feldman* Doctrine Beyond The Contours Authorized By This Court's Unanimous Decision in *Exxon Mobil Corp., Inc. v. SaudiBasic Industries Corp.*, 544 U.S. 280(2005) And Wrongly Deprives The Petitioners Of Redress In Federal Court For the Violation of Their Rights.

Under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413(1923), only the Supreme Court, not the lower federal courts, has jurisdiction to review state court decisions. *Id.* at 416. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462(1983), this Court further held that federal district courts may not exercise jurisdiction over facially constitutional issues which are "inextricably intertwined" with a state court judgment since this would be tantamount to a federal district court sitting in direct review of the decisions of the state tribunal. *Id.* at 476;482 n.16. Thus the *Rooker-Feldman* doctrine prohibits federal district courts from adjudicating actions in which the relief requested

requires determining that the state's decision is wrong or voiding the state court's ruling.

In a unanimous opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280(2005), the Court sought to simplify the reach of the *Rooker-Feldman* doctrine and to rein in any expansive views of the doctrine which have led lower federal courts to refuse to hear cases which legitimately invoked their federal jurisdiction.

Speaking through Ginsburg, J., the *Exxon Mobil* Court held:

> The *Rooker-Feldman* doctrine...is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court Judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Id. at 283-284. *Exxon Mobil* involved parallel state and federal litigation and this Court held that *Rooker-Feldman* is not triggered simply by the entry of a judgment in state court. *Id.* at 292-293. Disposition of the federal claim, once the state-court adjudication is complete, would be governed by regular preclusion law consonant with the Full Faith and Credit Act, 28 U.S.C. § 1738.

Where the petitioners have already dismissed without prejudice the state-court litigation at the time they seek to invoke federal jurisdiction under 28 U.S.C. § 1332 or § 1343, and where there is no final state court judgment which a federal court is being asked to review, the *Exxon Mobil* Court stated that

> [§] 1257 [does not] stop a district court from exercising subject-matter jurisdiction .... If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party..., then there is jurisdiction.....

Id. at 293. See also *Lance v. Dennis*, 546 U.S. 459(2006) *passim.* Moreover, after *Mobil Exxon*, without a *final* state court judgment, *Rooker-Feldman* does not apply in any event. See *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3rd 17, 23-25(1st Cir. 2005)("finality" under *Rooker-Feldman* analyzed).

Given this law, it was an unauthorized expansion of *Exxon Mobil* for the court of appeals to rely upon on *Rooker-Feldman* to affirm the district court's refusal to add BGE as a plaintiff to the petitioners' third-party complaint in federal court and allow it to pursue claims against Bridgeview for conversion, tortious interference, unlawful foreclosure, abuse of process and conspiracy.

Bridgeview's loan documents with Tal and TTI reserved to Bridgeview the right "to foreclose other mortgages which secure the Note against real property *other than the property which is the subject of [these]*

proceedings"(App. 23;44)(emphasis supplied). Thus Bridgeview possessed the right to foreclose on BGE's property as a way to pay off TTI's loan to Bridgeview which loan was already the subject of Bridgeview's cross claim against Tai and TTI in this federal suit. Accordingly, the propriety of Bridgeview's non-judicial foreclosure of BGE's property in state court was central to the validity of its cross claim in the federal action; and BGE, the owner of the property subject to Bridgeview's non-judicial foreclosure, had the right to participate in this federal suit as a matter of right and be heard on its claims that Bridgeview tortiously and unlawfully pursued foreclosure.

In the aftermath of *Exxon Mobil*, then, once the petitioners dismissed their state-court proceeding without prejudice, there was no "final" state court judgment and the *Rooker-Feldman* doctrine provides no good reason rooted in federalism to deny federal courts the jurisdiction to hear the petitioners' (and BGE's) claims against Bridgeview that its foreclosure violated BGE's rights.

In the second place, none of BGE's claims about Bridgeview's conduct were "inextricably intertwined" with any state court judgment; they did not require any state court judgment to be rejected; and they could be resolved without examining any underlying state-court decision. Under this Court's analysis in *Exxon Mobil*, the *Rooker-Feldman* doctrine is not invoked.

Third, the adding of BGE as a third-party plaintiff would produce a complaint seeking declaratory or injunctive relief which would *inter alia* nullify the state-court non-judicial foreclosure

proceedings. Where a plaintiff asks a federal court to declare a state court proceeding null and void, the federal court considers this prayer as one requesting an injunction enjoining its enforcement. *Rhoades v. Penfold*, 694 F.2d 1043, 1047(5th Cir. 1983) quoting *Gresham Park Comm. Organ. v. Howell*, 652 F.2d 1227, 1235-1236(5th Cir. 1981). But a complaint seeking an order enjoining the enforcement of a state-court judgment is *not* one seeking appellate review of a state-court judgment in federal court and it does *not* run afoul of any articulation of the *Rooker-Feldman* doctrine in the wake of this Court's decision in *Exxon Mobil*.

Fourth, BGE would also allege that Bridgeview's resort to the non-judicial foreclosure proceedings on this record *itself* amounts to a deprivation of BGE's constitutional rights since at the minimum it was deprived of adequate notice or an opportunity to be heard incident to the state court proceedings. Simply put, BGE is entitled to redress in federal court for the "deprivation, under color of...State law, ...custom or usage, of [a] right,...secured by the Constitution of the United States...," giving the federal court jurisdiction under § 1343.

Indeed, this Court has repeatedly held that the federal courts have jurisdiction over claims that state judicial and non-judicial proceedings cause deprivations of federal constitutional rights as long as those claims are otherwise properly before the federal courts. See, e.g., *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 88-89(1975); *Mitchum v. Foster*, 407 U.S. 225, 242-243(1972); *Ex Parte Young*, 209 U.S. 123, 167-168(1908). See also *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1,

18(1987)(Scalia, J., concurring); *id.* at 21(Brennan, J., concurring); *id.* at 28(Blackmun, concurring); and *id.* at 31 n.3(Stevens, J., concurring).

After *Exxon Mobil*, there is no question that the petitioner's due process claims should have been before the district court for resolution. In fact, invoking *Rooker-Feldman* here continues the denial of due process for BGE, i.e., both federal courts below have made express rulings affecting BGE's rights and remedies against Bridgeview, only *after* ruling that BGE was not entitled to intervene as a party-plaintiff in this litigation.

2. As A Matter Of Due Process of Law and the Equal Protection of the Laws, The Sole Owner of the Assets Of Small, Closely Held Family Corporations Who Is Not An Attorney Should Have The Right To Personally Represent The Corporations In This Litigation.

By notes and quitclaim deeds, both of the corporate entities TTI and BGE validly assigned to Tal all of their assets and properties as well as their claims in this litigation. In addition, members of both TSFLP and TS Trust voted to assign to Tal all of their interests and authorized him to represent and protect their interests in any legal action. At various times throughout this litigation, however, Tal was denied the opportunity to personally represent TTI and TSFLP (or BGE) in this action (App. 16). The court of appeals affirmed this ruling, relying upon its prior decision in *Tal v. Hogan*, 453 F.3rd 1244, 1253-1255(10th Cir. 2006) which had addressed the same question raised by Tal concerning his *pro se* representation of TTI and

Bricktown there(App. 16).

As a matter of constitutional law and federal procedure, the court of appeals was wrong on both counts. The long standing rule of general application for almost two centuries is that corporations, partnerships or associations must be represented in federal court by licensed counsel. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-203(1993). *Commercial and Rail Road Bank v. Slocumb*, 39 U.S.(14 Pet.) 60, 65(1840). *Osborn v. Bank of the United States*, 22 U.S.(9 Wheat.) 738, 830(1824). *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 556-557(10th Cir. 2001). The principal reasons for the rule are that (1) unlike natural persons, corporations can only act except through the agency of others and, in litigation, through licensed attorneys; (2) only licensed attorneys, familiar with the workings of courts, could prosecute and defend on behalf of corporations instead of non-lawyer advocates who could burden the courts; (3) the aggregate interests of the corporation could not be adequately represented by non-lawyer advocates; and (4) those who take advantage of the corporate form must suffer its burdens. *U.S. Polycon Corp. v. U.S.*, 43 Fed. Cl. 11, 14(Ct. Cl. 1999). *Strong Del. Min. Assn. v. Board of App. of Cook Cty.*, 543 F.2d 32, 33-34(7th Cir. 1976).

None of these reasons provides a coherent rationale for depriving Tal, a non-lawyer but also the sole assignee of all the assets of TTI, TSFLP, BGE and TS Trust, all closely held family entities, of the right to personally represent himself and these entities here. Tal is now the sole shareholder and sole assignee of all the assets of these entities; there is no question of agency—he represents himself and his assets in this

litigation. In addition, lay persons are allowed to represent themselves in Article III courts; there is no sound reason for depriving Tal of the opportunity to represent the closely held corporations and associations which he controls absolutely and to do so would be a denial of the equal protection of the laws and equal access to the courts. *U.S. Polycon Corp.*, 43 Fed. Cl. at 14. *Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182-183(E.D.N.Y. 1976)(Weinstein, J.). Moreover, given the closely held nature of these family companies, the only economic interests possibly affected are those of the layperson (Tal) seeking to represent these entities. To deny him the right of self representation while providing it to a sole proprietor is a denial of equal protection of the laws. Finally, the corporate form was intended to protect absent shareholders and provide competence in corporate administration, considerations which have no force with closely held family corporations and associations.

For these cogent reasons, numerous courts have held that as a matter of due process and the equal protection of the laws, a non-lawyer who is a sole shareholder or the sole owner of the assets of other unincorporated associations should be permitted to personally represent these entities in litigation. *U.S. Polycon Corp., supra. Traktman v. City of New York*, 582 N.Y.S.2d 808, 809(App. Div. 1992). *Willapa Trading Co. v. Muscanto, Inc.*, 727 P.2d 687, 690(Wash.App.1986). *United States v. Priority Products, Inc.*, 615 F.Supp. 593, 596(CIT 1985). *Matter of Holliday's Tax Services, Inc., supra. Kamp v. In Sportswear, Inc.*, 335 N.Y.S.2d 306, 306(1972). *Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc.*, 266 A.2d 698, 702(Pa. 1970).

Finally, owning every asset of these closely held family corporate entities, Tal is the real party in interest in this proceeding within the meaning of Fed. R. Civ. P. 17(a) and deserves to represent those interests personally in federal court even though he is a non-lawyer. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528-529(1984). *Titus v. Wallick*, 306 U.S. 282, 290(1939). See also *Bradbury v. Dennis*, 310 F.2d 73,74(10th Cir. 1962); *Willheim v. Murchison*, 206 F. Supp. 733, 735(S.D.N.Y. 1962).

3. The Decision Below Nullifies Substantive Oklahoma Law Which Recognizes the Rights of Parties To Enforce An Executed Oral Modification Of A Written Agreement, Creates Federal Common Law, Instigates Forum Shopping and Subverts the Policies of Federalism and Comity Enunciated In *Erie R. Co. v. Tompkins*, 304 U.S. 63(1938).

Under *Erie R. Co. v. Tompkins*, 304 U.S. 64(1938), when a federal court exercises diversity, pendent or supplemental jurisdiction over state law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151(1988) quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109(1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which it otherwise would enjoy under state law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000)(Rehnquist, C.J.,

concurring).

As the Court explained in *Erie*,

> the Constitution of the United States [including the Tenth Amendment] ... recognizes and preserves the autonomy and independence of the States----independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

304 U.S. at 78-79. See *Alden v. Maine*, 527 U.S. 706, 754(1999)(States' sovereignty must be respected by Article III federal courts).

Erie, a core expression of our federal system, mandates that a federal court exercising diversity jurisdiction will apply the substantive law of Oklahoma, the forum State, in order to decide the rights of the parties absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226(1991). "The nub of the policy that underlies *Erie*...is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Ferens v. John Deere Co.*, 494 U.S. 516, 524(1990) quoting *Guaranty Trust Co. v. York, supra.*

In addition, this Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell, supra,* quoting *Meredith v. Winter Haven,* 320 U.S. 228, 238(1943). See *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 208-209(1938). See also *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 730(1979); *West v. A.T. & T. Co.,* 311 U.S. 223, 236-237(1940); *Six Companies v. Highway Dist.,* 311 U.S. 180, 188(1940).

Moreover, in view of the court of appeals' affirmative duty to review independently and then correct the district court's determination of state law when fixing the rights of the parties, *Erie, supra; Salve Regina College v. Russell,* 499 U.S. at 231; 234, it was incumbent on the court of appeals to carry out this task so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws,"*Hanna v. Plumer,* 380 U.S. 460, 468(1965)—were accomplished.

The court of appeals failed this fundamental duty. Creating federal "general" common law at odds with the substantive law of Oklahoma in order to reach a particular result, see *Sosa v. Alvarez-Machain,* 542 U.S. 692, 726(2004), it reasoned that regardless of the parties' summary judgment materials, Bank One and Tal could not as a matter of law modify their written loan agreement by their conduct to create an executed

agreement under which the petitioners were not in default.

This conclusion is fundamentally at odds with Oklahoma decisional and statutory law. Regardless of the statute of frauds provisions contained within15 O.S. §§ 140A & B, concerning so-called "credit agreements," 15 O.S. § 237 (executed oral contract modifies written contract) and numerous decisions in Oklahoma establish that parties to a written contract may modify the terms of their contract by their presently executed conduct. *Allen Farms, Inc. v. Broce Const. Co. Inc.*, 134 P.3d 852, 855(Ok. Civ. App. 2005). *Big John's Lumber Co. v. City Bank*, 901 P.2d 832, 833-834(Ok. App. 1995). *Brown v. Founders Bank and Trust Co.*, 890 P.2d 855, 863(Ok. 1994). *Knittel v. Sec. State Bank, Mooreland*, 593 P.2d 92, 96(Ok. 1979).*Watt Plumbing v. Tulsa Rig, Reel & Mfg.*, 533 P.2d 980, 983(Ok.1975). See *Swain v. Seamans*, 76 U.S. 254, 273-274(1869).

The parties here did just that when Bank One and Tal and TTI agreed that Bank One would defer from collecting loan payments by Tal or TTI until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment. The court of appeals erred by refusing to acknowledge this established precedent and violated *Erie's* principles.

This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145(1996), is therefore a matter which invokes this Court's power of superintendency over the federal courts so that the decision here does not damage federal-state relations, does not lead to divergent

opinions on this issue of executed oral modifications of written contracts, a legitimate interest of Oklahoma state law as well as public policy generally, and does not promote forum shopping, all considerations which prompted this Court to decide *Erie* in the first place.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the Western District of Oklahoma, with instructions that the petitioner be given the opportunity through further discovery and an eventual trial in the district court to show that his counterclaims and third-party claims against the respondent banks present triable issues of material fact; or provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 05-6232
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DCR FUND I, LLC, a Florida limited liability company,
Plaintiff-Appellee

v.

TS FAMILY LIMITED PARTNERSHIP, an Oklahoma limited partnership; MOSHE TAL, an individual; TAL TECHNOLOGIES, INC., an Oklahoma corporation,
Defendants-Appellants,

And

JIM ROTH; STAN INMAN; JACK CORNETT, as Board of County Commissioners; FORREST BUTCH FREEMAN, as Treasurer of Oklahoma County, Oklahoma; OKLAHOMA EMPLOYMENT SECURITY COMMISSION; L.D. RHODES OIL CO., an Oklahoma corporation; L. D. RHODES; THE CITY OF OKLAHOMA CITY, a municipal corporation,
Defendants,

v.

BANK ONE, N.A.; T. VAN ROBERTS; C. E. RENFRO; KEVIN BLANEY, BRIDGEVIEW BANK, N.A.,
Third-Party-Defendants-Appellees,

SUCCESSOR METROBANK, N.A.,
Cross-Claimant-Appellee.

January 24, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For DCR FUND I LLC, a Florida limited liability company, Plaintiff - Appellee: Michael D. Gray, Britton, Ramsey and Gray, P.C., Oklahoma City, OK.

For TS FAMILY LIMITED PARTNERSHIP, an Oklahoma limited partnership, TAL TECHOLOGIES INC., Defendant - Appellants: W. Dan Nelson, Edmond, OK.

For MOSHE TAL, Defendant - Appellant: Moshe Tal, Oklahoma City, OK.

For JIM ROTH, STAN INMAN, JACK CORNETT, FORREST BUTCH FREEMAN, as Treasurer of Oklahoma County, Oklahoma, Defendants: Gretchen Crawford, Office of the District Attorney, Oklahoma City, OK.

For BANK ONE, N.A., Third-Party-Defendant - Appellee: James M. Meredith, JP Morgan Chase Bank NA, Dallas, TX; R. Greg Andrews, Mullins, Hirsch & Jones, Oklahoma City, OK.

For T. VAN ROBERTS, Third-Party-Defendant - Appellee: Ann L. Hoover, Topeka, KS.

For C. E. RENFRO, Third-Party-Defendant - Appellee: Ann L. Hoover, Topeka, KS; J. Kevin Blaney, Oklahoma City, OK.

For KEVIN BLANEY, Third-Party-Defendant - Appellee: J. Kevin Blaney, Elizabeth A. Morehead, Oklahoma City, OK.

For SUCCESSOR METRO BANK N.A., successor Metro Bank N.A., Cross-Claimant - Appellee: Kevin Blaney, Jones, Blaney & Williams, Oklahoma City, OK; Ann L. Hoover, Topeka, KS, Elizabeth A. Morehead, Oklahoma City, OK.

JUDGES: Before O'BRIEN, PORFILIO, and ANDERSON, Circuit Judges.

OPINION BY: Terrence L. O'Brien

OPINION

ORDER AND JUDGMENT *

In 2001 appellant Tal Technologies Inc. ("TTI") defaulted under the terms of a November 8, 1996, promissory note ("Note") in favor of appellee Bank One, N.A. ("Bank One"). Bank One subsequently sold the Note to appellee DCR Fund I, LLC ("DCR"). When TTI failed to comply with DCR's demands for payment, DCR filed this action seeking foreclosure of an associated mortgage and the enforcement of guaranty agreements provided to secure the loan. The

defendants[1], led by TTI's president, appellant Moshe Tal, asserted a defense and numerous counterclaims based on the contention that Bank One had orally agreed to defer payments under the Note until the completion of a condemnation proceeding involving property owned by Mr. Tal in downtown Oklahoma City. The defendants also asserted third-party claims against Bank One based, on its sale of the Note to DCR without disclosing the alleged oral agreement. DCR and Bank One denied the existence of any such agreement and moved for summary judgment. On December 6, 2004, the district court granted the motion based primarily on its determination that any oral deferral agreement between Bank One and TTI was barred by Oklahoma's credit agreement statute of frauds, Okla. Stat. tit. 15. § 140. The court also awarded summary judgment to appellee Bridgeview Bank, N.A. ("Bridgeview"), which had been brought into the action because of its interest in the mortgaged property. Defendants appeal, and we affirm.

I. Background and Procedural History

A. DCR Note

The Note is a boiler-plate, one-page document executed by Mr. Tal on behalf of TTI in the principal amount of $ 250,000. It provided for 59 monthly payments plus one additional payment, with accrued interest, due on the maturity date of November 8, 2001. The Note was secured by a first mortgage on TTI's property located at 200 S.E. 3rd Street in Oklahoma City (the "TTI property") and two guaranty agreements, one provided by Mr. Tal personally and the other by appellant TS Family Limited Partnership ("TSFLP"). Two provisions

of the Note are relevant here. The "ACCELERATION" clause provided that,

> [a]t option of holder, the unpaid balance of this Note . . . shall become immediately due and payable without notice or demand upon the occurrence or existence of any of the following events or conditions: (a) Any payment required by this Note . . . is not made when due . . . .

Aplt. App. Vol. 7 at 2522. The second relevant clause, entitled "ENTIRE AGREEMENT," specifically required any future modifications to the Note to be in writing.

> All parties acknowledge receipt of a copy of this Note and that this Note and related documents contain the complete and entire agreement between Debtor and Lender and no variation, modification, changes or amendments to this Note or related documents shall be binding unless in writing and signed by all parties.

Id.

In 1998 TTI stopped making payments under the Note, and Bank One filed a foreclosure action concerning the TTI property. To avoid the foreclosure, in March 1999 TTI borrowed enough money to bring the Bank One loan current from Bridgeview's predecessor, MetroBank, N.A. To secure this loan, TTI granted MetroBank a second mortgage on the TTI property. In exchange for payment totaling approximately $ 60,000, Bank One dismissed the foreclosure action. TTI continued to make payments under the Note until

March 2001, when it again defaulted. It also failed to pay the Note in full upon maturity in November 2001.

In July 2002, Bank One sold the Note and assigned its interest in the mortgage and guaranty agreements to DCR. Shortly thereafter, DCR began its attempts to collect under the Note by sending demand letters to Mr. Tal in his capacity as president of TTI. Mr. Tal responded to one such letter on February 2, 2003, by explaining his plan to consolidate DCR's loan with the Bridgeview loan. He assured DCR that he was "only a few weeks away from getting everything line[d]-up." *Id.* at 2537. He also "remind[ed]" DCR of Bank One's alleged agreement to defer payment under the Note pending the outcome of the condemnation litigation, which, he explained, was not proceeding as quickly as anticipated. *Id.* When DCR requested documentation as to the alleged oral deferral agreement, however, none was forthcoming. On April 21, 2003, DCR sent a formal notice of default to TTI, Mr. Tal, and TSFLP, demanding full payment under the Note in the amount of $ 233,076.97 plus future interest. When the defendants failed to meet this demand, DCR filed this action against them and named Bridgeview as a defendant because of its security interest in the TTI property.

B. Bridgeview Loans and the BGE Property

In addition to the funds it loaned to TTI in March 1999 to stop Bank One's foreclosure action, Bridgeview made several other loans to TTI, which it secured with property owned by Bricktown Grain Elevator Company ("BGE"), another of Mr. Tal's related entities. BGE had borrowed money from Bridgeview in January

1999, securing the loan with a first mortgage on property that it owned at 300 S.E. 4th Street in Oklahoma City ("BGE property"). TTI's March 1999 loan was secured by a second mortgage on the BGE property in addition to the second mortgage on the TTI property. In June 1999, TTI borrowed more money from Bridgeview to fund the ongoing condemnation litigation. This so-called litigation loan was renewed in October 2000, On May 15, 2001, TTI consolidated the March 1999 and October 2000 loans by executing a promissory note in favor of Bridgeview in excess of $ 200,000. This May 2001 loan was secured by interests in both the TTI and BGE properties.

Shortly after DCR filed this action, Bridgeview filed a cross-complaint against TTI for defaulting on the May 2001 loan. The cross-complaint sought foreclosure of Bridgeview's second mortgage on the TTI property, but specifically reserved Bridgeview's "right to foreclose other mortgages which secure the [May 2001] Note against real property other than the [TTI property]." *Id.* Vol. I at 72. Concurrently, Bridgeview was pursuing a non-judicial foreclosure of its mortgage on the BGE property. On July 3, 2003, it sent a "Notice of Intent to Foreclose by Power of Sale" to BGE and Mr. Tal, advising of its intent to foreclose the BGE mortgage pursuant to its rights under the January 1999 and May 2001 loan documents. *Id.* Vol. 4 at 1569-71. On October 20, 2003, Mr. Tal attempted to stop the foreclosure sale by requesting injunctive relief in this action. The district court denied the application on October 27 because it found that BGE was not a party to and its property not subject to, this action. A state court judge also refused to enjoin the sale, and the BGE property was sold on October 28. Nonetheless, on

November 26, Mr. Tal Filed a Rule 60(b) motion in this action asking the district court to reconsider or vacate its denial of injunctive relief. The district court denied that motion on May 17, 2004, explaining that it had no power to enjoin a sale of land that had already occurred and that, in any event, it lacked jurisdiction to invalidate the sale of property that was not part of this action. The court further held that it lacked subject-matter jurisdiction over the claims that Mr. Tal was attempting to assert concerning the BGE property because those claims raised no questions of federal law and were asserted against Oklahoma citizens.[2] The court went on to reject Mr. Tal's attempt to invoke the supplemental jurisdiction statute, stating:

> In this case, the court has original jurisdiction -- based on diversity jurisdiction -- over DCR's claim regarding the TTI note and mortgage. Tal seeks to interpose state law claims against non-diverse defendants regarding a different loan, made by a different bank, at a different time, and secured by different real property. The claims that Tal seeks to raise are simply not so related to the DCR case that they are part of the same case or controversy. Furthermore, the values of judicial economy, convenience, fairness, and comity do not compel the court's exercise of supplemental jurisdiction over these claims as they are currently being litigated in state court.*Id.* Vol. 5 at 1978-79 (quotation omitted).

C. Award of Summary Judgment, to DCR, Bridgeview, and Bank One

Both DCR and Bridgeview moved for summary

judgment on their claims under their respective loan documents relating to the TTI property. Bank One joined DCR's motion, seeking dismissal of the third-party claim. Each motion was accompanied by the relevant promissory notes, mortgage, and guaranty documents as well as evidence of TTI's default. Mr. Tal responded on behalf of the defendants. He conceded executing the relevant loan documents, but argued that other disputed facts excused TTI's failure to pay.

With respect to DCR's claim, he asserted that his agreement with Bank One to defer payments under the Note until the conclusion of the condemnation litigation constituted an executed oral agreement under Oklahoma law that changed the terms set forth in the Note. He claimed that not only was TTI not in default, but that DCR should be held liable for breaching the executed oral agreement. He made similar arguments in response to Bridgeview's motion, claiming that MetroBank had orally agreed to extend the line of credit secured by the TTI property, but that Bridgeview's management reneged on the agreement after assuming control of the bank. He further claimed that Bridgeview's new management then coerced him into consolidating the March 1999 and October 2000 loans under extremely unfavorable terms that he agreed to solely because he had been under intense stress both personally and professionally. He also argued TTI did not default on the May 2001 loan because Bridgeview, through a pattern of practice, had agreed to accept irregular payments with the understanding that TTI's largest client was usually late in paying TTI's invoices. Finally, Mr. Tal argued Bridgeview's cross-claim was simply an attempt to gain

court approval of its unlawful non-judicial foreclosure sale of the BGE property.

On December 6, 2004, the district court granted the creditors' motions, rejecting as a matter of law all affirmative defenses based on alleged oral agreements. Specifically, the court concluded the alleged oral agreements, which contradicted the express terms of the loan documents, ran afoul of the parol evidence rule, the notes' integration clauses, and Oklahoma's statute of frauds. Given the legal insufficiency of the defense, the court declined to decide whether the defendants had presented enough evidence to establish the existence of the oral agreements. The court went on to dismiss the defendants' counterclaims as well as the third-party claim against Bank One.

With respect to Bridgeview's claim, the court rejected Mr. Tal's duress defense as a matter of law because it was not caused by any actions of Bridgeview; his stress in May 2001 was caused by a combination of his wife's illness and the failure of TTI's clients to timely pay their bills. Like DCR, the court concluded that Bridgeview was entitled to foreclose its lien on the TTI property because the defendants admitted to executing the May 2001 note and mortgage documents and failed to establish a defense to non-payment. Since the principal and interest due under that loan was satisfied by the proceeds from the sale of the BGE property, the court declared Bridgeview's mortgage a junior lien on the TTI property, which secured payment of its attorneys fees, as provided under the loan documents.

Defendants appeal the district court's summary

judgment ruling as well as several other orders, as discussed below.

II. Discussion

Defendants have identified no less than twenty issues for review and attached to their briefs an appendix consisting of seventeen district court orders that allegedly contain factual and/or legal errors. Their briefs, however, fail to substantively address most of the issues raised, and to a large degree, do not identify which specific orders contain the complained-of errors. While we have done our best to match the challenged orders with the legal issues substantively discussed in the briefs, this court will not comb through a voluminous record searching for legal and factual findings to support vague allusions in the briefs. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998). After carefully considering defendants' arguments, we conclude they have sufficiently raised, such that we may adequately address, the following four issues: (a) whether the district court's December 6, 2004, order granting summary judgment in favor of DCR, Bridgeview, and Bank One was correct; (b) whether the court erred in denying Mr. Tal's request for injunctive relief with respect to Bridgeview's sale of the BGE property and denying his request to assert claims arising out of the sale; (c) whether the court erred in barring Mr. Tal's pro se representation of TTI and TSFLP; and (d) whether it abused its discretion in denying the defendants' motion to extend the discovery period.

A. Summary Judgment Ruling

We review a district court's grant of summary judgment de novo, construing all facts and reasonable inferences in the light most favorable to the non-moving party. *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 1231 (10th Cir. 2007). We must affirm the award of summary judgment if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In diversity cases our role is to ascertain and apply the proper state law . . . with the goal of insuring that the result obtained is the one that would have been reached in the state courts. We review de novo the district court's rulings with respect to state law." *Henrie*, 502 F.3d at 1231 (quotation omitted).

The district court relied on several legal principles in concluding DCR and Bridgeview were entitled to summary judgment on their foreclosure claims. However, the application of Oklahoma's statute of frauds was dispositive and we can affirm on that basis alone. *See Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1088 (10th Cir. 2006) (noting this court's discretion to affirm on any ground adequately supported by the record). Even if the defendants could prove the existence of oral agreements that contradicted the terms of the relevant loan documents and could further establish exceptions to the parol evidence rule and the notes' integration clauses, their asserted defenses based on the oral agreements were conclusively barred by Oklahoma statute.

Under Oklahoma law, a borrower may not

> maintain an action to enforce or seek damages

> for the breach of any term or condition of [a] credit agreement having a principal amount greater than Fifteen Thousand Dollars . . . unless such term or condition has been agreed to in writing and signed by the party against whom it is sought to be enforced.

Okla. Stat. tit. 15, § 140(B). Credit agreement is defined as

> an agreement by a financial institution to lend money, extend credit or otherwise make any other financial accommodation, or to renew, extend, modify, rearrange or forebear the repayment of any such loan, extension of credit or financial accommodation, but does not include any promissory note, real estate mortgage, or security agreement.

Id., § 140 (A)(1). This law is "intended to discourage lender liability litigation and to promote certainty into credit agreements," *Brown v. Founders Bank and Trust Co.*, 1994 OK 130, 890 P.2d 855, 862 (Okla. 1994), and clearly applies to the facts of this case. There is no dispute that any agreement by Bank One or Bridgeview to accept deferred payments under the relevant promissory notes would constitute a credit agreement under § 140, as found by the district court. It is also beyond dispute that, if the parties reached such agreements, they were not reduced to writing. The assertion of this defense, therefore, raised no disputed material fact for the jury's consideration, and summary judgment in favor of DCR and Bridgeview was therefore proper. *See Big John's Lumber Co. of Muskogee v. City Bank, of Muskogee*, 1995 OK CIV

APP 100, 901 P.2d 832, 833-34 (Okla. Civ. App. 1995) (affirming grant of summary judgment to bank under § 140 because borrower's conversion claim was based on alleged oral agreement to lend money in excess of $ 15,000).

Defendants contend that the banks' agreement to accept deferred payments constituted "executed oral agreements" under Okla. Stat. tit. 15, § 237, sufficient to modify the terms of the written loan documents notwithstanding the statute of frauds.[3] We reject this argument because section 237 is inapplicable to the facts of this case. It has long been established that "the subsequent executed oral agreement referred to in § 237 . . . must be established by positive, clear and convincing proof." *Dewberry v. Universal C.I.T. Credit Corp.*, 1966 OK 77, 415 P.2d 978, 979 (Okla. 1966) (quotations omitted). Furthermore, even once established, an oral agreement is "ineffective to alter the terms of the written contract until its terms have been fully executed." *Id.* The district court in this case held that "[g]iven [the] lack of evidence, it [was] not at all apparent that the Tal defendants could prove by clear and convincing evidence the existence of an executed oral agreement to defer payment." Aplt. App. Vol. 9 al 3188 n.9. Our own review of the parties' summary judgment papers revealed nothing that would cause us to disagree with this assessment. Moreover, it is undisputed that even if the parties took some actions consistent with the alleged oral agreements, such agreements were never fully executed. Under these circumstances, they could not operate to alter the terms of the written loan documents, and DCR and Bridgeview were therefore entitled to summary judgment. *See Walker v. Johnson*, 1924 OK 516, 102

Okla. 9, 227 P. 113, 114 (Okla. 1924) (holding that extinguishment of written contract could not be proved by unexecuted parol agreement).[4] It follows that the defendants' third-party claim against Bank One based on its failure to disclose the alleged oral agreement failed as a matter of law.

B. Bridgeview's Sale of the BGE Property

Defendants' second assertion of error concerns the district court's rulings with respect to Bridgeview's sale of the BGE property, in addition to requesting injunctive relief to halt the sale, the defendants asserted numerous cross-claims against Bridgeview after the sale, including claims for conspiracy, abuse of process, and conversion. In its December 6, 2004, order, the district court dismissed those claims for the same reasons it denied Mr. Tal's request for injunctive relief, concluding that it had no jurisdiction over claims relating to the BGE property. Defendants appeal both the denial of injunctive relief and the dismissal of their cross-claims. Instead of addressing the district court's jurisdictional analysis, however, they primarily challenge the court's evidentiary rulings and focus on reasons why they believe the BGE sale was unlawful. We need not address those arguments because the district court was correct with respect to its jurisdiction. We also fail to see how any claims challenging a foreclosure sale that the state court allowed to proceed could pass muster under either the *Younger* abstention or *Rooker-Feldman* doctrines.[5] We therefore affirm both the district court's denial of injunctive relief and its dismissal of claims arising out of Bridgeview's sale of the BGE property.

C. Mr. Tal's Pro Se Representation of Corporate Defendants

Mr. Tal, proceeding pro se, filed a separate brief on appeal challenging, multiple orders denying his requests to personally represent TTI and TSFLP in this action. His arguments concerning this issue are rambling and confusing, but generally, he contends that although he is not a lawyer, he is entitled to legally represent the corporate defendants pursuant to various assignments and his rights as a corporate officer and lien holder. Additionally, he argues that the rule requiring a corporation to appear in federal court only through an attorney at law is unconstitutional.[6] Mr. Tal concedes that he argued this identical issue in *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), which was still pending before this court when the instant appeal was briefed. We have since rendered a decision in that case, however, in which we rejected Mr. Tal's arguments, holding squarely that "the district court did not err in denying Tal the right to represent Tal, Inc. and Bricktown, Inc. *pro se* and requiring the corporations to secure counsel." Id. at 1254. For the same reasons discussed in that opinion, *see id.* at 1254-55, we reject Mr. Tal's arguments here. We also agree with the district court that Mr. Tal's arguments based on the assignment documents are without merit.

D. Motion to Extend Discovery Period

On May 4, 2004, the district court entered a scheduling order setting a discovery cut-off date of September 1, 2004. A week before the cut-off date, the defendants filed a motion to extend the discovery period, arguing that the case was too complex to complete discovery

within the time allotted, particularly since counsel for the corporate defendants had only recently entered an appearance. DCR, Bridgeview, and Bank One countered that an extension of the discovery period would only reward the defendants' dilatory conduct. They pointed out that the court had ordered Mr. Tal to secure counsel for the corporate defendants in August 2003, but that he had delayed doing so by filing one motion after another until May 2004. Even so, they argued there was sufficient time between the corporate counsel's entry of appearance and the discovery cut-off, and that the only reason the defendants had not been able to complete discovery was because they had squandered that time. On September 7, 2004, the district court denied the motion based on the parties' responses, without further discussion.

The defendants appeal the district court's order, renewing their argument that the case was too complex to complete discovery in the time allotted. This argument erroneously assumes that Mr. Tal was justified in failing to secure counsel for the corporate defendants for nearly a year after he was ordered to do so. In short the defendants have "offered no colorable reason why the discovery deadline should have been extended." *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1151 (10th Cir. 2006). Therefore, the district court did not abuse its discretion in denying the extension.

III. DCR's Request For Attorneys' Fees

Finally, we address DCR's request for appellate attorneys' fees under both the express provisions of the Note and Okla. Stat. tit. 12, § 936. Section 936 provides:

In any civil action to recover . . . on [a] . . . note, bill, negotiable instrument . . ., unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.The district court granted DCR's request with respect to fees incurred below, and we see no reason to deny its request on appeal. *See Cadle Co. v. Bianco*, 1992 OK CIV APP 175, 849 P.2d 437, 440 (Okla. Civ. App. 1992) (upholding award of attorneys' fees under section 936). Moreover, the Note expressly provided that "[a]ll parties liable for payment . . . agree to pay reasonable costs of collection, including an attorney's fee." Aplt. App. Vol. 7 at 2522. Since we affirmed the district court's award of summary judgment to DCR on its claims under the Note and guaranty documents, an award of appellate attorneys' fees is warranted.

IV. Conclusion

For the reasons discussed above, we AFFIRM the judgment of the district court in all respects. We grant DCR's request for attorneys' fees on appeal and REMAND to the district court for the limited purpose of determining the proper amount.

Entered for the Court

Terrence L. O'Brien

Circuit Judge

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument

would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1Our use of the generic term "defendants" throughout this order and judgment refers only to the defendants who filed the instant appeal, TTI, Moshe Tal, and TS Family Limited Partnership. DCR named several other entities and individuals because of their possible interests in the property at issue, but the claims against those parties are not relevant to this appeal.

2Mr. Tal had previously filed a motion seeking to consolidate this action with one he filed in state court against Bridgeview, its officers, and others for their involvement in the non-judicial foreclosure sale of the BGE property.

3Section 237 provides that "[a] contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

4Defendants also assert error with respect to the district court's dismissal of their conspiracy counter-claim against DCR. Although their argument is accompanied by citations to a handful of documents in the record, defendants fail to explain how these documents support a claim for conspiracy, something

that is not obvious to this court. Given their failure to present a cogent argument as to how the district court erred with respect to these defendants on this issue, we affirm the dismissal of the conspiracy claim without further discussion. *See Scott, v. Hern*, 216 F.3d 897, 910 n.7 (10th Cir. 2000) (declining to manufacture a party's argument on appeal).

5"The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced." *Lance v. Dennis*, 546 U.S. 459, 460, 126 S. Ct. 1198, 163 L. Ed. 2d 1059 (2006) (quotations omitted) (per curiam); *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923). *Younger* abstention applies even if the state proceedings are on-going when the federal action is filed so long as the state action implicates important state interests with which a federal judgment would interfere. *See D.L. v. Unified Sch. Dist.* No. 497, 392 F.3d 1223, 1227-28 (10th Cir. 2004) (citing *Younger v. Harris*, 401 U.S. 37, 54, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)).

6*See, e.g., Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 556 (10th Cir. 2001) ("As a general matter, a corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing pro se."); *see also* W.D. Okla. L. Civ. R. 17.1 ("Parties who are not natural persons may not appear pro se").

No. CIV-03-772-L
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
DCR FUND I, L.L.C.
Plaintiff,

v.

TAL TECHNOLOGIES, INC., et al.,
Defendants and

MOSHE TAL, individually and as assignee of claim of Tal Technologies Inc., TS Family Limited Partnership, and Bricktown Grain Elevator Company,
Counterclaimant/Third Party Plaintiff,

v.

DCR FUND I, L.L.C., and BRIDGEVIEW BANK, N.A.,
Counterclaim/Cross Claim Defendants,

v.

BANK ONE, N.A., et al.,
Third-Party Defendants.

ORDER

On June 5, 2003, plaintiff, DCR Fund I, L.L.C., filed this action seeking to recover on a promissory note executed by defendant Tal Technologies, Inc. ("TTI") in

favor of Bank One, N.A. In addition, DCR seeks to foreclose the mortgage associated with the note and to enforce guaranty agreements executed by defendants TS Family Limited Partnership and Moshe Tal, president of TTI. The DCR mortgage covers property located at 200 S.E. Third Street in Oklahoma City. After the note and mortgage were assigned to DCR by Bank One, DCR brought this action claiming that TTI had defaulted on the note.

The Tal defendants answered and admitted executing the promissory note, mortgage, and guaranty agreement[1] they deny, however, that DCR is entitled to recover. They claim that DCR's predecessor in interest, Bank One, orally agreed to defer payments on the note pending the outcome of condemnation litigation between TTI and the City of Oklahoma City.[2] Based on this oral agreement, the Tal defendants asserted a counterclaim against DCR and a third-party action against Bank One. Defendants claim that DCR is not entitled to payment until "the Tals receive money judgment from one of the two pending lawsuits related to the condemnation issue.[3] Consolidated Joint Amended Answer to DCR's Complaint and Counterclaim; and Joint Amended Third-Party Complaint at 7, Par. 8. In the thirdparty action, defendants contend that Bank One sold the note to DCR without informing it of the oral deferral agreement. Although it is unclear, it appears that the Tal defendants are seeking to enforce the alleged oral agreement. See id. at 24, Par. 65.

In addition to naming TTI, Tal, and TS Family Limited Partnership as defendants, DCR named entities[4] that might have some interest in the real property,

including Bridgeview Bank, N.A. Bridgeview answered the complaint and filed a cross-complaint against TTI and Tal. Bridgeview alleged that TTI has defaulted on a note executed on May 15, 2001 and that Tal is liable to it pursuant to a guaranty agreement executed that same date. In addition, Bridgeview alleged that the note was secured by a mortgage on the same property covered by the DCR mortgage and that Bridgeview's

> mortgage lien is a second lien subject to [DCR's] first mortgage lien as to Tracts 1 - 6 described in [DCR's] Complaint; however, upon information and belief, Tract 6, as described in Bridgeview Bank's Tal Mortgage includes additional real property mortgaged to Bridgeview Bank, N.A. in which [DCR] has no interest. To the extent that fact is proved to be true, Bridgeview Bank alleges its lien against said additional real property (for tract 6) is a first mortgage lien.

Answer and Cross-Complaint of the Defendant, Bridgeview Bank, N.A. at Par. 9. Bridgeview specifically reserved "its right to foreclose other mortgages which secure the Note against real property other than the property which is the subject of [these] proceedings." Id. at Par. 10.

This matter is before the court on motions for summary judgment presented by DCR, Bank One, and Bridgeview. Summary judgment is appropriate if the pleadings, affidavits, and depositions "show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Any doubt as to the existence of a genuine issue of material fact must be

resolved against the party seeking summary judgment. In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Board of Education v. Pico, 457 U.S. 853, 863 (1982). Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

"[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). In addition, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The undisputed facts establish that on November 8, 1996, TTI executed a promissory note in favor of Bank One in the principal amount of $250,000.00. Exhibit 7 to Joint Motion of Plaintiff, DCR Fund I, L.L.C., and Third-party Defendant, Bank One, N.A., for Summary Judgment [hereinafter cited as Plaintiff's Motion]. The note reflected a maturity date of November 8, 2001 and provided for 59 monthly payments with the balance plus accrued interest due at maturity. The monthly

payments were to be adjusted annually beginning December 8, 1997, with the initial monthly payment set at $2,841.49. Id. The note contained an integration clause which provided that "[a]II parties acknowledge receipt of a copy of this Note and that this Note and related documents contain the complete and entire agreement between Debtor and Lender and no variation, modification, changes or amendments to this Note or related documents shall be binding unless in writing and signed by all parties." Id. Tal signed the note as president of TTI.

In addition to executing the note, TTI granted Bank One a mortgage on property located at 200 S.E. Third Street in Oklahoma City ("the TTI property"). Exhibit 8 to Plaintiff's Motion. Pursuant to the terms of the mortgage,[5] TTI agreed "to pay when due all sums secured by this Mortgage" and to "pay all insurance premiums attributable to the Property". Id. The mortgage provided that "[u]pon Borrower's breach of any covenant or agreement in this Mortgage, Lender, at its option, may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand". Id. Payment of the note was guaranteed by Tal, individually, and the TS Family Limited Partnership. Exhibits 9 and 10 to Plaintiff's Motion. Both guaranty agreements provided that

> This Agreement supersedes all prior guaranty agreements and understandings between the undersigned and the Lender and constitutes the entire Guaranty Agreement between them. There are no understandings, agreements, representations or conditions, oral or written, between the undersigned and the Lender except

> as set forth in this Agreement and related written loan documents. This Guaranty Agreement may not be amended or modified except by a writing signed by the undersigned and the Lender.

Id. at Par. Q.

In a letter dated May 6, 1998, Bank One notified Tal that the note was in default because TTI failed to make the payments due in February, March, and April 1998. Exhibit 22 to Plaintiff's Motion. Bank One commenced foreclosure proceedings on February 24, 1999 due to TTI's failure to cure the default. Thereafter, Rene Belford of Bank One and Tal exchanged letters negotiating dismissal of the foreclosure action. On March 17, 1999, Belford wrote Tal that "[d]uring our conversation you indicated that you would be able to bring the note current, reimburse Bank One for legal fees, plus provide updated financial statements in return for halting the pending foreclosure on the property that secures the loan." Exhibit 29 to Plaintiff's Motion at 1. Belford indicated that her department manager "agreed to consider dropping the pending foreclosure" provided Bank One received payment of $60,000.00 in certified funds and receipt of an updated financial statement for TTI. Id. On March 31, 1999, Tal notified Belford that he made payments on March 30, 1999 pursuant to their agreement "to bring the loan account current ... plus make an additional $20,000 to reduce the loan amount." Exhibit 31 to Plaintiff's Motion. In return, he indicated that "I trust that you will notify your attorney and have him dismiss the lawsuit promptly (you told me that you will do it as soon as the payments are made)." Id. Belford responded

that "[t]he $62,622.35 will be applied first, to the unpaid interest (at the default rate), and the remainder to the balance outstanding." Exhibit 32 to Plaintiff's Motion. Belford reminded Tal that he had "also agreed to pay the attorney fees, as well as the Phase I Environmental, separately." Id. On April 5, 1999, Tal transmitted the funds for payment of Bank One's attorney's fees and the environmental study. Exhibit 35 to Plaintiff's Motion. Bank One dismissed the foreclosure action without prejudice on April 9, 1999. Exhibit 36 to Plaintiff's Motion.

TTI acquired the funds necessary to settle the Bank One foreclosure action from Bridgeview's predecessor, MetroBank, N.A. On March 30,1999, TTI executed a promissory note in the principal amount of $76,821.00. Exhibit 5 to Defendant Bridgeview Bank, N.A.'s Motion for Summary Judgment [hereinafter cited as "Bridgeview's Motion"]. To secure payment of the note, TTI granted MetroBank a second mortgage on the TTI property. Exhibit 6 to Bridgeview's Motion. On June 28, 1999, TTI obtained a second loan from MetroBank in the amount of $102,226.00 and executed a third mortgage on the TTI property. Exhibits 8, 9, and 10 to Bridgeview's Motion. On October 6, 2000, TTI executed a promissory note for a line of credit with a total amount to be advanced of $152,226.00. Exhibit 11 to Bridgeview's Motion. This note was a renewal of the June 28, 1999 loan, together with a $50,000.00 increase in the amount loaned. Id. On May 15, 2001, TTI executed a promissory note in favor of Bridgeview Bank in the principal amount of $218,253.45 ("the 2001 note"). Exhibit 18 to Bridgeview's Motion. The 2001 note, which was a renewal of the March 30, 1999 and the October 6, 2000 loans, is the note at issue in this

action. Id.; Answer and Cross-Complaint of the Defendant, Bridgeview Bank, N.A. at Par. 2. To secure payment of the 2001 note, TTI granted Bridgeview a third mortgage on the TTI property and Bricktown Grain Elevator Company ("BGE") granted Bridgeview a second mortgage on property located at 300 S.E. Fourth Street in Oklahoma City ("the BGE property").[6] xhibits 19 and 20 to Bridgeview's Motion. The 2001 note reflected a maturity date of May 15, 2011, but provided that the unpaid balance "shall become immediately due and payable without notice or demand [if] ... any payment required by this Note or by any other note or obligation of Debtor to Lender or to others is not made when due, or any event or condition occurs or exists which results in acceleration of the maturity of any Debtor's obligation to Lender or to others under any promissory note agreement or undertaking. . . ." Exhibit 18 to Bridgeview's Motion. The 2001 note also contained an integration clause reflecting that the note and related documents "contain the complete and entire agreement between Lender and any party liable for payment under this Note. No variation, condition, modification, change or amendment to this Note or related documents shall be binding unless in writing and signed by all parties." Id. In the 2001 note, TTI agreed to pay "an attorney's fee equal to a minimum of 15% of all sums due upon default or such other maximum fee as allowed by law." Id. Likewise, the mortgage provided for payment of attorney's fees in the event of default and noted that the payment of such fees "shall be secured by this Mortgage." Exhibit 19 to Bridgeview's Motion at 2.

On October 28, 2003, the BGE property was sold by Bridgeview through a non judicial foreclosure pursuant

to Oklahoma's Power of Sale Mortgage Foreclosure Act. As a result of the sale of the BGE property, the principal and interest due under the 2001 note have been satisfied in full. Bridgeview Bank, N.A.'s Supplemental Pleading to Answer and Cross Complaint Filed June 25, 2003 at Par. 8 Bridgeview has thus amended its cross-claim to seek only an assessment of costs and attorney's fees. It asks the court to declare that such fees and costs are secured by the mortgage on the TTI property and to foreclose that mortgage. Id. at 3.

The Tal defendants do not dispute the execution of the notes, mortgages, or guaranty agreements at issue. Based on alleged oral agreements to defer payment of the notes, they do, however, dispute that the notes were in default. In addition, the Tal defendants assert a number of affirmative defenses to bar recovery under the notes and guaranty agreements. Defendants bear the burden of establishing these defenses,' which the court finds they have not done.

Motion by DCR and Bank One

Defendants argue that, although the Bank One note contained an explicit maturity date, the parties had orally agreed that it would be rolled over on the maturity date for at least one additional five-year term. Thus, the Tal defendants contend that TTI's failure to pay the note on November 8, 2001 does not constitute a default.[8] The parties hotly dispute whether this oral agreement ever existed. The court, however, need not resolve this dispute because evidence of the alleged oral agreement is barred by the parol evidence rule and the note's integration clause.

> The parol evidence rule is not a rule of evidence but is instead a rule of substantive law. Mid-America Corp. v. Miller, 1962 OK 123, 372 P.2d 14, 18; see also Restatement (Second) of Contracts § 213, comment a (1979). Under the parol evidence rule, pre-contract negotiations and oral discussions are merged into and superseded by the terms of an executed writing. 15 O.S. 1991, § 137; Bonner v. Oklahoma Rock Corp., 1993 OK 131, 863 P.2d 1176, 1180; see also Restatement (Second) of Contracts § 213 (1979). The rule provides that parol evidence cannot vary, modify or contradict the terms of an executed written agreement. Ollie v. Rainbolt, 1983 OK 79, 669 P.2d 275, 279. The rule fosters an important public policy - the certainty and stability of contracts. American Perforating Co. v. Oklahoma State Bank, 1970 OK 4, 463 P.2d 958, 963. The parol evidence rule applies not only to note makers but also to guarantors and sureties. Maney v. Cherry, 1935 OK 115, 41 P.2d 82, 84.

First Nat'l Bank v. Honey Creek Entertainment Corp., 54 P.3d 100, 103-4 (Okla. 2002). The Bank One note clearly reflects a maturity date of November 8, 2001, with no roll-over provision. Oklahoma law is clear that "'the plain terms of a promissory note cannot be varied by parol evidence, and pleading that the note was to be paid at a later date than stated in the note constitutes no defense to the action.'" American Perforating Co. v. Oklahoma State Bank, 463 P.2d 958, 966 (Okla. 1970) (quoting Wignall v. Montgomery, 49 P.2d 163 (1935)).

Likewise, the court finds that defendants' assertion

that Bank One agreed to defer payment of the note pending the outcome of the state condemnation proceeding does not constitute a defense to this action. Oklahoma law provides that "[a] contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." 15 O.S. § 237. It is undisputed that no written contract evidencing the deferral agreement exists. Deposition of Moshe Tal at 73. Defendants contend that an oral deferral agreement was reached in March 1999 when the parties were negotiating the dismissal of Bank One's foreclosure action. Evidence of such an agreement must be clear, positive and convincing. Black v. Silver, 274 P. 886, 888 (Okla. 1928).

> When parties in the first instance take the precaution to reduce their agreements in writing, especially concerning matters of considerable importance, involving the expenditure of large sums of money or incurring extensive liabilities, it is a strong presumption that any material modification of that agreement, also, will be put in the same or some definite form and susceptible of the same degree of proof as the former agreement. This presumption, however, is not conclusive. But in addition to such a provision as section 5081 C.O.S. 1921, which provides the only methods of modifying a written contract, the proof of the modification of a contract in writing by a subsequent oral agreement must be clear and convincing. The foundation upon which rests written contracts make that rule of evidence imperative.

Id. at 887-88. Moreover, the oral contract must have been executed to effectively modify the written agreement. 15 O.S. § 237. Furthermore, Oklahoma law requires that agreements to "renew, extend, modify, rearrange or forebear" the repayment of loans such as the one at issue must be in writing to be enforceable. 15 O.S. § 140.

The court need not decide whether the evidence offered by the Tal defendants is sufficient to establish the existence of an oral agreement to defer payments[9] because enforcement of any such agreement is barred by Oklahoma's statute of frauds. The alleged agreement to defer payments is clearly a "credit agreement" as defined by the Oklahoma statute: it is an alleged agreement to make a financial accommodation or to "extend, modify, or rearrange" the repayment schedule. 15 O.S. § 140(A)(1). Likewise, TTI and Tal are "borrowers" as they are persons who sought "a credit agreement with a lender or financial institution ... or for whom any such loan, extension of credit or financial accommodation is renewed, extended, modified, rearranged or forborne by a lender....15 O.S. § 140(A)(4). The statute clearly provides that

> No . . . borrower may maintain an action to enforce or seek damages for the breach of any term or condition of credit agreement having a principal amount greater than Fifteen Thousand Dollars ($15,000.000), unless such term or condition has been agreed to in writing and signed by the party against whom it is sought to be enforced or against whom damages are sought.

15 O.S. § 140(B). The Tal defendants are barred as a matter of law from enforcing the alleged oral agreement. DCR and Bank One are thus entitled to summary judgment on this defense. See Big John's Lumber Co. v. City Bank of Muskogee, 901 P.2d 832, 834 (Okla. App. 1995).

The court also finds that the Tal defendants have failed to establish the defense of equitable estoppel. Equitable estoppel does not apply unless there has been a false representation. See Flesner v. Cooper, 162 P. 1112, 1116 (Okla. 1917). The Tal defendants have not presented any admissible evidence to demonstrate that Bank One made any representation regarding the alleged deferral agreement, much less a false representation. Defendants cannot rely on the Affidavit of Gary W. Flanders as it contains inadmissible hearsay. See, supra n.9. The documentary record does not evidence any discussion of a deferral agreement with Bank One and Tal concedes in his deposition that no such agreement was reached between him and the only person at Bank One with whom he was negotiating in March 1999. Deposition of Moshe Tal at 434.

Finally, the court finds that defendants have presented no evidence to support the civil conspiracy claim and that as a matter of law cannot assert counterclaims against DCR for abuse of process or violation of the Fair Debt Collection Practices Act.[10] In response to the motion for summary judgment, the Tal defendants conceded that they had no evidence of a conspiracy, but hoped to discover some. Defendants did not, however, file a Rule 56(f) affidavit and the court has denied their motion to compel, so it appears that no further evidence will be forthcoming. Because DCR has utilized the

court's process for legitimate purposes, the Tal defendants cannot assert a claim for abuse of process. See Bank of Oklahoma, N.A. v. Portis, 942 P.2d 249, 255 (Okla. App. 1997). The Fair Debt Collection Practices Act[10] does not apply to this transaction because it was not "for personal, family, or household purposes". 15 U.S.C. § 1692a(5). Furthermore, DCR is not a debt collector as defined by the Act. 15 U.S.C. § 1692a(6).

Motion by Bridgeview Bank

The court finds that the only note at issue with respect to Bridgeview is the 2001 note. Thus, any claims and assertions by the Tal defendants regarding any other notes are immaterial and irrelevant. The 2001 note does not reflect a deferral agreement and any attempt by the Tal defendants to incorporate such an agreement runs afoul of the parol evidence rule and Oklahoma's statute of frauds. See, supra at 11-14.

Because the Tal defendants' counterclaims do not contain "a short and plain statement of the claim",[11] the counterclaims asserted against Bridgeview are not clearly presented. It appears, however, that defendants claim that execution of the 2001 note was due to economic duress. Defendants' Joint Amended Answer to Bridgeview Bank's Cross-Complaint, and Counterclaim Against Bridgeview at Par. 2 [hereinafter cited as Defendants' Joint Amended Answer]. The remaining allegations in the counterclaim concern promissory notes that either were superseded by the 2001 note or are not at issue in this action. Furthermore, to the extent the Tal defendants have attempted to assert any claims arising out of the non-judicial foreclosure of the BGE property, the court

reiterates that that property and the issues surrounding that foreclosure are not before the court in this litigation.[12] Thus, the court does not address the alleged tort claims for conspiracy, abuse of process, conversion, tortious interference with business relations, accounting, and fraud.

An examination of defendants' duress claim reveals that it fails as a matter of law.

> In Oklahoma, economic duress allows a party to avoid a contract that it has entered if a "wrongful act [of the other party was] sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure." As that rule suggests, a party seeking to prove economic duress must prove that the defendant committed a wrongful act. More importantly, however, the plaintiff must also show a causal relationship between the bad act and the contract at issue. The defendant's bad act, not something else, must have forced the plaintiff to sign the burdensome contract. As the Centric court stated, "the coercing party has been subjected to legal sanctions if . . . its actions or threats caused impaired bargaining power .... "

Strickland Tower Maintenance, Inc. v. AT&T Communications, Inc., 128 F.3d 1422, 1426 (10th Cir. 1997) (citations omitted) (emphasis in original). Mere hard bargaining is insufficient to establish economic duress, as is the alleged victim's business necessities or financial embarrassment. Centric Corp. v. Morrison-Knudsen Co., 731 P.2d 411, 417 (Okla. 1986). Duress

must be proved by substantial evidence[13] and whether the facts alleged are sufficient to constitute economic duress is a question of law for the court. Centric Corp., 731 P.2d at 417.

The duress alleged by the Tal defendants arose not as a result of actions by Bridgeview, but as a result of TTI's cash flow problems and personal difficulties encountered by Tal. Specifically, beginning in March 2001, two payments totaling $25,000.00 from one of TTI's major distributors were dishonored. In addition, the distributor owed TTI more than $50,000.00 for products they had purchased. December 8, 2003 Affidavit of Moshe Tal at Par. 18 (attached as Exhibit A to Moshe Tal's Response and Objections to Defendant Bridgeview's Motion for Summary Judgment). In addition, during this time period, Tal was in St. Louis, Missouri with his wife who was being treated for a rare form of cancer. Id. at Par. 14-15. Tal contends that he signed the 2001 note because he was "attending to his wife's cancer treatment, and could not leave her and come to Oklahoma City to challenge Bridgeview's threat of foreclosure if he refused to sign the May 15, 2001 new `consolidated' loan agreement." Defendants/Third-Party Plaintiffs' Joint Amended Objections to Defendant Bridgeview's Motion for Summary Judgment at 12. As unfortunate as these circumstances were, they were not created by or caused by Bridgeview and therefore as a matter of law cannot constitute economic duress.

The court finds that defendants have admitted executing the 2001 note and TTI mortgage[14] and have not established a defense thereto. In addition, Bridgeview has established that TTI was in default

under the terms of the note and mortgage. Affidavit of C.E. Renfro at Par.15; see also December 8, 2003 Affidavit of Moshe Tal at Pars. 30-32; Defendants' Joint Amended Answer at Par. 33 (admitting that as of June 2003 "TTI was about 2 payments behind"). Bridgeview is therefore entitled to foreclose its lien on the TTI property.

Conclusion

In sum, the court finds that DCR has established execution of the note, mortgage, and guaranty agreements as well as TTI's default for failure to pay the note when due and for failure to maintain insurance on the property." The Tal defendants have not proved any of their affirmative defenses or counterclaims against DCR or the third-party action against Bank One. Bank One is thus entitled to dismissal and DCR is entitled to judgment in its favor. Likewise, Bridgeview has established execution of the 2001 note and mortgage on the TTI property as well as TTI's default. Because the principal and interest due on the 2001 note have been satisfied in full, Bridgeview is not entitled to a money judgment from the court, but is entitled to a judgment declaring its mortgage a junior lien on the TTI property and that the mortgage secures the payment of attorney's fees associated with this foreclosure proceeding.

In sum, Defendant Bridgeview Bank, N.A.'s Motion for Summary Judgment (Doc. No. 124) is GRANTED to the extent noted above. Any cross-claims purportedly asserted by the Tal defendants with respect to the BGE property have not been considered part of this action and have not been ruled on by this court. The

Joint Motion of Plaintiff, DCR Fund I, L.L.C., and Third-Party Defendant, Bank One, N.A., for Summary Judgment (Doc. No. 207) is GRANTED. In light of these ruling, following motions are DENIED as moot: the Tals' Motion to Stay these Proceedings Pending Outcome of Criminal Proceedings of Key Witness of All Parties and Amended/Corrected Motion to Stay (Doc. Nos. 206 and 207); the Joint Motion to Strike Tal's Expert Witness List (Doc. No. 208) and Moshe Tal's Motion to Stay Proceeding Subject to his Medical Condition (Doc. No. 254). Plaintiff is directed to provide the court with an agreed journal entry of judgment reflecting the court's rulings no later than December 15, 2004.

It is so ordered this 6th day of December, 2004.

TIM LEONARD
United States District Judge

Footnote(s)

[1]While the Tal defendants admit that Tal and TS Family Limited Partnership executed guaranty agreements, they deny that such agreements were "executed and delivered to DCR." Defendants correctly note that the guaranty agreements were executed in favor of Bank One.

[2] The litigation between the City and Tal is fully described in the Order issued by the Honorable Stephen P. Friot on September 30, 2003. Bricktown 2000, Inc. v. Hogan, Case No. CIV02-324-F, Order at 4-5 (W.D. Okla. filed Sept. 30, 2003).

[3]In the counterclaim, the Tal defendants allege that Bank One agreed in 1999 to defer payments pending the outcome of the state condemnation action or a federal action pending in this court, Bricktown 2000, Inc. v. Hogan, Case No. CIV-02-324-F (W. D. Okla. filed Mar. 13, 2002). It is undisputed, however, that the federal action was filed nearly three years after the oral agreement was allegedly executed.

[4] Defendants Oklahoma Employment Security Commission and L.D Rhodes Oil Company have disclaimed any right to and title in the real property.

[5] The mortgage also contained a "due on sale" clause, which permitted the Bank to declare all sums secured by the mortgage immediately due and payable if the property were transferred without the Bank's prior written consent. In the motion for summary judgment, plaintiff for the first time asserts the applicability of this clause because TTI allegedly transferred its interest in the property at issue to Tal on November 10, 2003. The court, however, does not address this alleged default because plaintiff did not seek to amend the complaint to present this issue.

[6]January 27, 1999, BGE executed a mortgage in favor of MetroBank to secure a loan issued by the Bank to BGE. The 2001 mortgage was thus secondary to the prior mortgage. On July 3, 2003, Bridgeview notified BGE and Tal (BGE's president) that it was accelerating the BGE note and the 2001 note and seeking non-judicial foreclosure of the BGE property if payment in full was not made. Exhibit 27 to Bridgeview's Motion.

[7] Persson v. McCormick, 412 P.2d 619, 621 (Okla. 1966).

[8]It is undisputed that the note was not paid in full on November 8, 2001. In addition to this default, the Tal defendants do not dispute that TTI allowed property and liability insurance on the TTI property to lapse and that DCR obtained such insurance in 2003. Exhibits 38, 41 to Plaintiff's Motion.

[9]While the evidence regarding the parties' March 1999 negotiations reflect a divergence of opinion regarding how the funds provided by Tal to bring the loan current would be applied, there is no mention in any of the correspondence that future payments would be deferred. Given this lack of evidence, it is not at all apparent that the Tal defendants could prove by clear and convincing evidence the existence of an executed oral agreement to defer payments. At this stage of the litigation, the Tal defendants cannot rely on conclusory allegations to prove their affirmative defenses. Furthermore, the Tal defendants' wholesale adoption of other papers filed in this court is insufficient to withstand summary judgment as the court has no duty to "comb the record of previously available evidence and make a party's case for it." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998). The court has, however, reviewed the November 17, 2003 Affidavit of Gary W. Flanders, as DCR and Bank One attached a copy of it to their reply brief. That affidavit, however, contains inadmissible hearsay and thus does not comply with the requirements of Fed. R. Civ. P. 56(e). *See* Burns v. Board of County Commissioners, 330 F.3d 1275,1284 n.5 (10th Cir. 2003). As such it provides no evidentiary support for defendants' contention that an oral agreement existed.

[10]In response to the summary judgment motion,

defendants did not address the National Banking Act claim. The court finds that, to the extent any such claim was asserted, defendants have waived the claim by failing to address it.

[11]Fed. R. Civ. P. 8(a)(2).

[12]See Order issued October 27, 2003 (Doc. No. 80); Order issued May 17, 2004 (Doc. No. 158); Order issued November 10, 2004 (Doc. No. 239).

[13]Cimarron Pipeline Construction, Inc. v. United States Fidelity & Guaranty Ins. Co., 848 P.2d 1161, 1162 (Okla. 1993).

[14]As noted earlier, the court makes no ruling with respect to the BGE mortgage.

[15]The Tal defendants' assertion that DCR did not plead the failure to pay insurance as required by the mortgage is without merit. See Complaint at Par. 9.

No. CIV-03-772-L
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
DCR FUND I, L.L.C.
Plaintiff,

v.

TAL TECHNOLOGIES, INC., et al.,
Defendants and

MOSHE TAL, individually and as assignee of claim of Tal Technologies Inc., TS Family Limited Partnership, and Bricktown Grain Elevator Company,
Counterclaimant/Third Party Plaintiff,

v.

DCR FUND I, L.L.C., and BRIDGEVIEW BANK, N.A.,
Counterclaim/Cross Claim Defendants,

v.

BANK ONE, N.A., et al.,
Third-Party Defendants.

ORDER

On June 5, 2003, plaintiff, DCR Fund I, L.L.C., filed this action seeking to recover on a promissory note executed by defendant Tal Technologies, Inc. ("TTI") in

favor of Bank One, N.A. In addition, DCR seeks to foreclose the mortgage associated with the note and to enforce guaranty agreements executed by defendants TS Family Limited Partnership and Moshe Tal, president of TTI. The DCR mortgage covers property located at 200 S.E. Third Street in Oklahoma City. After the note and mortgage were assigned to DCR by Bank One, DCR brought this action claiming that TTI had defaulted on the note. In addition to naming TTI, Tal, and TS Family Limited Partnership as defendants, DCR named Bridgeview Bank, N.A. as a defendant because it "may claim some right, title and interest" in the real property at issue. DCR Fund I, L.L.C. v. Tal Technologies. Inc., Case No. CIV-03772-L, Complaint at Par. 16 (W.D. Okla. filed June 5, 2003).

Bridgeview answered the complaint and filed a cross-complaint against TTI and Tal. Bridgeview alleges that TTI has defaulted on a note executed on May 15, 2001 and that Tal is liable to it pursuant to a guaranty agreement executed that same date. In addition, Bridgeview alleges that the note was secured by a mortgage on the same property covered by the DCR mortgage and that Bridgeview's

> mortgage lien is a second lien subject to [DCR's] first mortgage lien as to Tracts 1 - 6 described in [DCR's] Complaint; however, upon information and belief, Tract 6, as described in Bridgeview Bank's Tal Mortgage includes additional real property mortgaged to Bridgeview Bank, N.A. in which [DCR] has no interest. To the extent that fact is proved to be true, Bridgeview Bank alleges its lien against said additional real property (for tract 6) is a first mortgage lien.

DCR Fund I, L.L.C. v. Tal Technologies, Inc., Case No. CIV-03-772-L, Answer and Cross-Complaint of the Defendant, Bridgeview Bank, N.A. at Par. 9 (W.D. Okla. filed June 25, 2003). Bridgeview specifically reserved "its right to foreclose other mortgages which secure the Note against real property other than the property which is the subject of [these] proceedings." Id. at Par. 10.

One of those other properties is the subject of a mortgage executed by Bricktown Grain Elevator Company ("BGE") in favor of Bridgeview's predecessor. The mortgage, which covers property located at 300 S.E. Fourth Street in Oklahoma City, was executed to secure a note entered into by BGE on January 27, 1999. The BGE note provided that "[t]his Note is payable on demand. The inclusion of specific default provisions or rights of Lender shall not preclude Lender's right to declare payment of this Note on its demand." Exhibit F to Moshe Tal's Motion to Reconsider/Vacate October 27, 2003 Order at 1 ("Motion to Reconsider"). On July 3, 2003, Bridgeview demanded payment of the BGE note and the TTI note in full. Exhibit H to Motion to Reconsider at 1. In this notice, Bridgeview also gave notice of its intent to foreclose on the BGE mortgage through the power of sale granted to it in the mortgage. Id. The notice gave BGE 35 days to pay the amount due under its note, which it did not do. On September 18, 2003, Bridgeview issued an amended notice of sale informing interested parties that the mortgaged property would be sold pursuant to the Oklahoma Power of Sale Mortgage Foreclosure Act on October 28, 2003. Exhibit I to Motion to Reconsider.

On October 20, 2003, Tal filed an Application for

temporary Restraining Order and Temporary and Permanent Injunction in this court. Tal, acting on his own behalf and purportedly as the assignee of the claims of TTI, TS Family Limited Partnership, and BGE, sought to enjoin the October 28, 2003 sale. On October 27, 2003, this court denied the request for injunctive relief. DCR Fund I, L.L.C. v. Tal Technologies, Inc., Case No. CIV-03-772-L, Order at 4 (W.D. Okla. filed Oct. 28, 2003). That same day, Tal filed an action in Oklahoma County District Court, seeking to block the proposed sale. Tal v. Bridgeview Bank, N.A., Case No. CJ2003-8993 (D. Ct. Okla. Cty. filed Oct. 27, 2003) ("the state case"). On October 28, 2003, the Honorable Bryan C. Dixon also denied Tal's request for injunctive relief. The BGE property was then sold on October 28, 2003 to the highest bidder, JAR Associates, L.L.C., for $258,000.00. Exhibit N to Motion to Reconsider at 2.

This matter is before the court on Tal's motion to reconsider or vacate the court's Order denying his motion for injunctive relief. In addition, Tal seeks an order invalidating the non judicial foreclosure sale and returning the BGE property to him. Finally, Tal asks this court to consolidate this case with his state court case or, in the alternative, to allow him to amend his third-party action to assert his claims regarding the BGE property.

A "motion to reconsider" is not among the motions recognized by the Federal Rules of Civil Procedure. As Tal's motion to reconsider was not filed within the time limits of Rule 59(e), the court will treat the motion as a motion made pursuant to Rule 60(b). *See* Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 60(b); *see also* Van Skiver v.

United States, 952 F.2d 1241, 1243 (10th Cir. 1991), *cent. denied*, 506 U.S. 828 (1992). "Relief under Rule 60(b) is extraordinary and may only be granted in exceptional circumstances." Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co., 909 F.2d 1437, 1440 (10th Cir. 1990). Such relief is appropriate only "when circumstances are so `unusual or compelling' that extraordinary relief is warranted, or when it offends justice' to deny such relief." Casner v. Freedom Stores, Inc., 98 F.3d 572, 580 (10th Cir. 1996).

The court denies Tal's motion to reconsider or vacate the order denying his request for injunctive relief. The court cannot retroactively enjoin a sale that has already occurred. To the extent Tal is seeking to vacate that part of the court's Order that declared he did not have standing to assert claims on behalf of the corporate entity BGE, the court finds that Tal has failed to demonstrate that relief pursuant to Rule 60(b) is warranted. Furthermore, this court cannot provide Tal with the alternative relief he seeks. This court does not have jurisdiction to invalidate the sale of the BGE property; that property is not - and has not been - part of this litigation. Tal's argument that Bridgeview sought judicial foreclosure of the BGE mortgage is logically and legally flawed. Bridgeview's answer merely asserted that it had first priority with respect to other property that was not at issue in this litigation. Moreover, that property will not become part of this litigation because the court does not have subject matter jurisdiction over the claims with respect to the BGE property. Tal seeks to amend his third-party complaint to assert state law claims against Oklahoma citizens. Although Tal did not attach a copy of his proposed amended third-party complaint, he indicated

that "his Amended Complaint would be consistent with the claims made in his State Amended Petition.[1] The amended petition asserts state law claims for conversion, tortious interference with business, unlawful foreclosure of the BGE property, abuse of process, and conspiracy.[2] Tal has not contested that each of the defendants he seeks to name are Oklahoma citizens;[3] in fact, the amended state petition affirmatively alleges that all of the individual defendants are residents of the State of Oklahoma.[4] Id. at 3. As Tal seeks to allege only state law claims, federal question jurisdiction does not exist.[5]

Because he proposes to assert the state law claims against fellow citizens of Oklahoma, diversity jurisdiction does not exist.[6]

Perhaps recognizing that no independent jurisdictional basis exists, Tal argues that this court has ancillary jurisdiction over his claims regarding the BGE property. In the Judicial Improvements Act of 1990, Congress codified the supplemental jurisdiction of federal courts. Section 1367(a) of Title 28 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In this case, the court has original jurisdiction - based on diversity jurisdiction - over DCR's claim regarding the TTI note and mortgage. Tal seeks to interpose state law claims against non-diverse defendants regarding a different loan, made by a different bank, at a different time, and

secured by different real property. The claims that Tal seeks to raise are simply not so related to the DCR case that they are part of the same case or controversy. Furthermore, "the values of judicial economy, convenience, fairness, and comity"' do not compel the court's exercise of supplemental jurisdiction over these claims as they are currently being litigated in state court.

In moving to consolidate this action with the state case, Tal appears to be arguing that he should be permitted to remove the state case to this court. Tal, as the plaintiff in the state court action, however, cannot remove that case to this court. "Removal jurisdiction can be conferred on a federal court only by a defendant. A plaintiff cannot remove a state court action even when he or she could have commenced the action originally in a federal court." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3721 (footnotes omitted).

In sum, Moshe Tal's Motion to Reconsider/Vacate October 27, 2003 Order which Denied his TRO/Injunction Application and Standing Issue (Doc. No. 101) is DENIED. The Motion to Invalidate Foreclosure Sale - Return Property (Doc. No. 101) is also DENIED. Moshe Tal's Motion to Transfer and Consolidate State Suit with this Suit (Doc. No. 131) is DENIED. The Alternative Motion to Grant Tal Leave to Amend his Counterclaim and Third Party Complaint and to Add Parties/Claims (Doc. No. 131) is also DENIED.

It is so ordered this 17th day of May, 2004.

Footnote

[1]Moshe Tal's Consolidated Reply to All Third-Party Defendants' Objections to his March 9, 2005 Motion to Transfer and Consolidate at 10 ("Reply").

[2] Exhibit F to Moshe Tal's Motion to Transfer and Consolidate State Suit with This Suit at 1415 ("Motion to Consolidate").

[3]1n his response to the Motion to Consolidate, third-party defendant Kevin Blaney asserted that "[a]II [of] "the defendants in the state court action are citizens of the State of Oklahoma." Kevin Blaney's Response at 2. Tal did not dispute this contention in his reply brief.

[4]Neither the amended petition nor any of the pleadings that the court has reviewed in this case reflects the state of incorporation or the principal place of business of Bridgeview. Thus, the court cannot determine Bridgeview's citizenship based on the current state of the record.

[5]1n his reply, Tal argues that the court "also has proper jurisdiction under th Fifth Amendment to the U.S. Constitution ... as well as the Fourteenth Amendment. . . ." Reply at 3. These claims, however, are unavailing as none of the defendants is a state actor.

[6]requirements of diversity jurisdiction are well-established.

[D]iversity jurisdiction does not exist unless

> *each* defendant is a citizen of a different State from *each* plaintiff. Over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.

Owen Equipment and Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978) (emphasis in original).

[7]Carnegie- Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

98

No. 07-1351

FILED

JUN 26 2008

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MOSHE TAL, INDIVIDUALLY,
TAL TECHNOLOGIES, INC. and
TS FAMILY LIMITED PARTNERSHIP,

Petitioners,

v.

DCR FUND I, L.L.C., BANK ONE, N.A. and
BRIDGEVIEW BANK

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DCR FUND I, L.L.C. AND BRIDGEVIEW BANK

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. The Orders denying Mr. Tal the right to join BGE as a party were correct and can only be reviewed for an abuse of discretion.

2. May a non-attorney represent a corporation or partnership in litigation as the attorney at law?

3. Whether the Tenth Circuit Court of Appeals properly applied Oklahoma Law in determining that the Petitioner's assertion of an executed oral agreement had not been established as a matter of law and/or fact?

RULE 29.6 DISCLOSURE

The corporate respondent DCR Fund I, L.L.C. is a non-governmental corporation with no parent or publicly held company owning ten percent or more of the corporation stock.

The corporate respondent Bridgeview Bank n/k/a Oklahoma Fidelity Bank is a non- governmental corporation with no parent or publicly held company owning ten percent or more of its corporate stock.

TABLE OF CONTENTS

	Page
Counter Statement of the Questions Presented	i
Rule 29.6 Disclosure	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement	1
Proposition I:	
Certiorari Should be Denied Because Petitioners Have Failed to Demonstrate an Abuse of Discretion in the Trial Court's Orders Denying Mr. Tal the Right to Assert BGE Claims	2
Proposition II:	
Certiorari Should be Denied Because the Law is Clear that a Corporation May Only Appear in Federal Court Through Licensed Legal Counsel	5

Contents

Page

Proposition III:

Certiorari Should be Denied Because The Tenth Circuit Properly Applied Oklahoma Law Pursuant to the Erie Doctrine When It Determined that the Loan Agreement was not Modified 9

A. Petitioner Misstates the Tenth Circuit's Ruling 10

B. The Tenth Circuit Properly Applied Oklahoma Law to the Facts of the Case 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

CASES:

Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 93 S. Ct. 1, 409 U.S. 1207, 34 L. Ed 21 (1972) 3

Black v. Silver, 274 P. 886 (Okla. 1928) 11

DeVilliers v. Atlas Corp., 360 F.2d 292 (10th Cir. 1966) 6-7

Dewberry v. Universal C.I.T. Credit Corporation, 415 P.2d 978 (Okla. 1966) 11

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 9

Flora Construction Co. v. Fireman's Fund Ins. Co., 307 F.2d 413 (10th Cir. 1962) 6

Gabriel v. Standard Fruit and Steamship Company, 448 F.2d 724 (5th Cir. 1971) 3

General Electric Company v. Irvin, 274 F.2d 175 (6th Cir. 1960) 3

Harrison v. Wahatoyas, LLC, 253 F.3d 552 (10th Cir. 2001) 6

Cited Authorities

	Page
Matter of Covington Grain Co., Inc., 638 F.2d 1357 (5th Cir. 1981)	3
Matter of Holliday's Tax Services, Inc., 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd*, 614 F.2d 1287 (2d Cir. 1979)	7, 8
Osborn v. President of Bank of United States, 22 U.S. 738, 6 L. Ed. 204 (1824)	6
Rowland v. California Men's Colony, 506 U.S. 194, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993)	5-6, 7, 8
Schiller v. Physicians Resource Group, Inc., 342 F.3d 563 (5th Cir. 2003)	3
Tal, et al. v. Hogan, et al., 453 F.3d 1244 (10th Cir. 2006)	5
Talasila, Inc. v. United States, 240 F.3d 1064 (Fed. Cir. 2001)	7
U.S. PolyCon Corp. v. United States of America, 43 Fed.Cl. 11 (U.S. Ct. of Fed. Claims, 1999)	7

Cited Authorities

Page

STATUTE:

15 O.S. 2001, § 237 11

RULE:

Rules of the Supreme Court of the United States, Rule 34(1)(f) 6

OTHER AUTHORITY:

36 C.J.S. *Federal Courts* § 615 3

STATEMENT

DCR Fund I, L.L.C. and Bridgeview Bank ("Joint Respondents") have reviewed the Petitioners' Statement presented in the Petition for Writ of Certiorari ("Petition"). For the sake of brevity the Joint Respondents do not wish to quibble over any minor misstatements of fact; however, it must be noted that the Statement section of the Petitioners' brief presents the Petitioners' allegations and not the facts as determined by the Western District of Oklahoma ("District Court") or by the Tenth Circuit Court of Appeals ("Tenth Circuit") and should be taken with a grain of salt. For example, the Petitioners assert, on page 12 of their Petition, that "Bank One agreed that for a payment . . . Bank One would defer from collecting loan payments by [Tal Technologies, Inc.] until the condemnation and related litigation concluded and the loan's balance plus accrued interest was paid out of the resulting judgment." In fact, as the District Court noted in its December 6, 2004 Order, "[t]he parties hotly dispute whether this oral agreement [between Bank One and the Petitioner Tal] ever existed." Additionally, both the District Court and the Tenth Circuit acknowledged that the Petitioners failed to produce any evidence to demonstrate that the alleged oral agreement was fully executed. *See Infra*, Proposition 3. To the extent that additional misstatements or factually unsupported assertions are made, and in the unlikely event that Certiorari is granted, the Joint Respondents request that the Court take nothing from the assertions made by the Petitioners and that any direct objection by the Joint Respondents to the particular assertions of the Petitioners not be waived pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

Proposition 1 Certiorari Should Be Denied Because Petitioners Have Failed to Demonstrate an Abuse of Discretion in the Trial Court's Orders Denying Mr. Tal the Right to Assert BGE Claims

Petitioners allege that the Tenth Circuit improperly relied upon *Rooker-Feldman* to affirm the District Court's refusal to add BGE as a third party plaintiff to pursue state court claims against Bridgeview for conversion, tortious interference, unlawful foreclosure, abuse of process, and conspiracy.

The Tenth Circuit's reference to *Rooker-Feldman* was nothing more than *obiter dictum* intended to lend further support for the District Court's ruling. The Tenth Circuit's opinion, in pertinent part, stated:

> In its December 6, 2004, order, the district court dismissed those claims for the same reasons it denied Mr. Tal's request for injunctive relief, concluding that it had no jurisdiction over claims relating to the BGE property. Defendants appeal both the denial of injunctive relief and the dismissal of their cross-claims. Instead of addressing the district court's jurisdictional analysis, however, they primarily challenge the court's evidentiary rulings and focus on reasons why they believe the BGE sale was unlawful. **We need not address those arguments because the district court was correct with respect to its jurisdiction.** We also fail to see how any claims challenging a foreclosure sale that the

> state court allowed to proceed could pass muster under either the *Younger* abstention or *Rooker-Feldman* doctrines. We therefore affirm both the district court's denial of injunctive relief and its dismissal of claims arising out of Bridgeview's sale of the BGE property.

(*See* Petition at 15a.) (emphasis added)

As to matters within the discretion of the trial court, appellate review is limited to the question of whether there has been an abuse of discretion. *See* 36 C.J.S. *Federal Courts* § 615. A trial court's ruling on intervention, joinder, misjoinder, amendments to pleadings, intervention, substitution, impleader, and other rulings with respect to parties, process, and pleadings are all within the trial court's discretion. *Gabriel v. Standard Fruit and Steamship Company*, 448 F.2d 724 (5th Cir. 1971); *Schiller v. Physicians Resource Group, Inc.*, 342 F.3d 563 (5th Cir. 2003); *Matter of Covington Grain Co., Inc.*, 638 F.2d 1357 (5th Cir. 1981); and *General Electric Company v. Irvin*, 274 F.2d 175 (6th Cir. 1960). The same standard of review applies to an order denying an injunction. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 93 S. Ct. 1, 409 U.S. 1207, 34 L. Ed 21 (1972).

The Petitioners' attempts to join BGE so that they could assert claims arising out of the nonjudicial foreclosure of the BGE property were ruled upon by the District Court on four (4) occasions: (a) Order issued October 27, 2003, Aplt. Appl. Vol. 2 at 667-661; (b) Order

issued May 17, 2004, Aplt. App. Vol. 5 at 1972-1980; (c) Order issued November 10, 2004, Aplt. App. Vol. 8 at 3078-3082; and (d) Order issued December 6, 2004, Aplt. App. Vol. 9 at 3176-3195. The Order of May 17, 2004 stated:

> In this case, the court has original jurisdiction — based on diversity jurisdiction — over DCR's claim regarding the TTI note and mortgage. Tal seeks to interpose state law claims against non-diverse defendants regarding a different loan, made by a different bank, at a different time, and secured by different real property. The claims that Tal seeks to raise are simply not so related to the DCR case that they are part of the same case or controversy. Furthermore, the values of judicial economy, convenience, fairness, and comity do not compel the court's exercise of supplemental jurisdiction over these claims as they are currently being litigated in state court. Aplt. App. Vol.5 at 1978-79.

Aplt. App. Vol 5 at 1972-1980.

The Petitioners have provided no argument or authority to show the District Court abused its discretion in denying Mr. Tal's requests. On the contrary, the record demonstrates a sound basis for both the District Court and Tenth Circuit rulings.

Proposition 2 Certiorari Should be Denied Because the Law is Clear that a Corporation May Only Appear in Federal Court Through Licensed Legal Counsel.

The Petitioners' second question presented in the Petition asks whether a principal shareholder of a corporation who is not an attorney at law may, under federal law, represent the corporate entity in federal court in a *pro se* like status. Despite the fact that: (1) federal law is quite clear on this matter; (2) the unchallenged Tenth Circuit decision in *Tal, et al. v. Hogan, et al.*, 453 F.3d 1244 (10th Cir. 2006), addressed this same issue; and (3) neither the Petitioners nor the record provide any evidence demonstrating that Tal Technologies, Inc. and TS Family Limited Partnership (Collectively referred to as the "Corporate Petitioners") were prejudiced by the requirement to have licensed counsel, the Petitioners contend that "[a]s a matter of constitutional law and federal procedure, the court of appeals was wrong" to "den[y Tal] the opportunity to personally represent TTI and TSFLP (or BGE) in this action[.]" Such assertion is without merit. In fact, despite such assertion, Petitioners fail to provide any support for the proposition that the Tenth Circuit violated constitutional law.

The rule against *pro se* representation by corporations is unambiguous and venerable. "It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. California Men's*

Colony, 506 U.S. 194, 201-02, 113 S. Ct. 716, 721, 121 L. Ed. 2d 656 (1993); citing *Osborn v. President of Bank of United States*, 22 U.S. 738, 829, 6 L. Ed. 204 (1824) (holding "[i]t is admitted that a corporation can only appear by attorney"). Clearly this issue has been long resolved by this Court. In fact, the Rules of the Supreme Court of the United States implicitly, if not explicitly, adopt and reinforce this rule when it states that "[n]ames of **persons** other than attorneys admitted to a state bar may not be listed [as counsel of record or on the cover sheet of the any brief], unless the party is appearing *pro se*[.]" (emphasis added). Rule 34(1)(f). Inasmuch as the legal definition of the word "person" does not include a corporation or partnership, this Court has prohibited a non-attorney from acting as counsel of record, or even being listed on the cover page.

The Tenth Circuit has followed the Supreme Court precedent as required. In *Flora Construction Co. v. Fireman's Fund Ins. Co.*, 307 F.2d 413, 414 (10th Cir. 1962), the Court applied the "well established" rule that "a corporation can appear in a court of record only by an attorney at law." Indeed, the *Flora Construction* Court rejected the notion that the Petitioners press here that a corporation's president, who is not a lawyer, has the capacity to speak in court on behalf of a corporation. *Id.*, at 413-14 (citing a plethora of authority from this Court to state court decisions). The Tenth Circuit has reaffirmed this principle repeatedly over the last several decades. *See Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 556 (10th Cir. 2001) ("[A] corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing *pro se*."); *DeVilliers v. Atlas Corp.*, 360 F.2d 292, 294

(10th Cir. 1966) ("[A] corporation can appear in a court of record only by an attorney at law.").

The Petitioners assert that an exception is provided pursuant to *U.S. PolyCon Corp. v. United States of America*, 43 Fed. Cl. 11 (1999), as well as several other cases. Unfortunately for the Petitioners, it is clear that the underlying rationale of *PolyCon* has been rejected and reversed on appeal by the United States Court of Appeals Federal Circuit in *Talasila, Inc. v. United States*, 240 F.3d 1064 (Fed. Cir. 2001). While *PolyCon* granted a similar exception as that requested by the Petitioners, the United States Court of Appeals Federal Circuit has effectively overruled the United States Court of Federal Claims' determination with regard to such exception. In doing so, the United States Court of Appeals Federal Circuit specifically rejected the *PolyCon* exception. *PolyCon* is no longer good authority and may not be relied upon by the Petitioners.

More importantly, the United States Court of Appeals Federal Circuit specifically noted that the law was clear and unqualified that a corporation could not be represented *pro se*, but could only be represented by counsel. In *Talasila*, the Court noted that this determination carried in effect the law as it had been for the better part of two centuries as noted in *Rowland, supra.*

Moreover, the Petitioners' reliance upon *Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd*, 614 F.2d 1287 (2d Cir. 1979) is also misguided as this Court has explicitly rejected any inference that corporations may represent themselves *pro se* based on

the *Holliday's Tax Services* decision, calling it aberrant. *See Rowland*, 506 U.S. at 203 n.5. Furthermore, the remaining cases cited by the Petitioners, most of which are state law cases which are inapplicable to federal law, fail to establish that the Tenth Circuit committed reversible error. In fact, it is quite the opposite in that the remaining cases cited by the Petitioners either reinforce the Tenth Circuit's decision or suggest that it is within the discretion of the court to determine if a corporation may be represented by a non-lawyer. In either event, the Petitioners have failed to submit a valid question for which *certiorari* could be granted.

It should also be noted that the Petitioners contend that Petitioner Moshe Tal ("Petitioner Tal") has a constitutional right to represent the Corporate Petitioners, as opposed to the Corporate Petitioners' right to be free from the requirement to obtain licensed legal counsel in the event of litigation. As there is no constitutional right to represent a third party in a legal proceeding, Certiorari must be denied. Even if the Court were to re-frame the question, it cannot be argued that the Corporate Petitioners have a right to circumvent the legal counsel requirement.

The rule requiring corporations litigating in federal court to appear through legal counsel is simple. There are certainly no reasons for an exception in this matter as the Petitioners have failed to demonstrate a reason for this Court to deviate from its established precedent. Additionally, the Petitioners' question and analysis fail to acknowledge that the corporate structure, complete with all of the benefits and protections, was the choice of Petitioner Tal. To grant Petitioner Tal the benefits

and protections of Corporate status, while relieving him of the regulations and restrictions associated therewith would only serve to obfuscate the difference between a sole proprietor and a corporation and circumvent Oklahoma's Corporation Code and public policy. Therefore, Petitioner Tal's question for certiorari requesting to appear *pro se* and litigate corporate claims on behalf of the Corporate Petitioners should not be considered.

Proposition 3 Certiorari Should be Denied Because The Tenth Circuit Properly Applied Oklahoma Law Pursuant to the Erie Doctrine When It Determined that the Loan Agreement was not Modified.

In the Petitioners' Petition the third and final question urges this Court to grant Certiorari on the ground that the Tenth Circuit failed to apply Oklahoma Law in violation of the Erie Doctrine established in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct 817, 82 L. Ed. 1188 (1938). Nothing could be further from the truth. In fact, a cursory reading of the Petition and the Tenth Circuit's Opinion clearly demonstrates: (1) that the Petitioners grossly misrepresent the Tenth Circuit's ruling, and; (2) that the Tenth Circuit properly applied Oklahoma Law to the facts of the case.

A. Petitioner Misstates the Tenth Circuit's ruling

"[The Tenth Circuit] reasoned that based on the parties' summary judgment materials, Bank One and [Petitioner] Tal could not as a matter of law modify their written loan agreement by their conduct to create an executed agreement under which the [P]etitioners were not in default." *See* Petition at 28, 29. Aside from the fact that such an assertion assumes that Petitioner Tal and Bank One entered into an executed agreement, a fact contradicted by the District Court and the Tenth Circuit, such assertion claims that the Tenth Circuit ruled that the law does not allow for a modification by executed agreement. As the Court can see from the Tenth Circuit's ruling, *See* Petition at 12a through 15a, the Tenth Circuit's ruling accurately applies Oklahoma law to the facts of the case and finds that the law allowing modification by executed oral agreement "is inapplicable to facts of this case." In fact, the Tenth Circuit's ruling specifically and directly applies Oklahoma law when it held that the "asserted defenses based on the oral agreements were conclusively barred by Oklahoma statute." *See* Petition at 12a. In other words, far from ruling that Petitioner Tal **could not as a matter of law** modify their written loan agreement, as Petitioners suggest, the Court found that Petitioner Tal **did not, as a matter of law and fact,** modify the loan agreement. Contrary to the assertion of the Petitioners, Oklahoma law was applied.

B. The Tenth Circuit Properly Applied Oklahoma Law to the Facts of the Case.

I. The Alleged Oral Modifications Are Not Binding Pursuant to the Terms of the Contract and Oklahoma Law.

The Petitioners have maintained in the District Court, as well as the Tenth Circuit, that the agreement, valued at over $15,000.00, was modified by an oral agreement pursuant to 15 O.S. 2001, § 237. The Petitioners claimed that the alleged oral modification of the credit agreement is a valid modification because the alleged modification had been executed. While it is true that Section 237 allows written contracts to be modified by fully executed oral agreements, such statement does not help the Petitioners.

The Petitioners contend that, pursuant to 15 O.S. 2001, § 237, Oklahoma statutory law permits a written contract to be modified by an executed oral agreement. Such statement of law is not disputed by the Tenth Circuit; to the contrary the statement of law was embraced by the Tenth Circuit. Unfortunately for the Petitioners, in order to establish an oral agreement sufficient to modify a written contract under Oklahoma law, the terms of the oral agreement must have been fully executed. *Dewberry v. Universal C.I.T. Credit Corporation*, 415 P.2d 978, 979 (Okla. 1966). Furthermore, the facts demonstrating and establishing a executed oral agreement must be established by clear and convincing evidence. *Black v. Silver*, 274 P. 886 (Okla. 1928); *See also Dewberry, supra.* The Tenth Circuit found that the Petitioners were unable to prove that

the modification had been executed by clear and convincing evidence:

> The district court in this case held that '[g]iven [the] lack of evidence, it [was] not at all apparent that the [Petitioners] could prove by clear and convincing evidence the existence of an executed oral agreement to defer payment'. . . .Our own review of the parties' summary judgment papers revealed nothing that would cause us to disagree with this assessment.

See Petition at 14a. Moreover, the Tenth Circuit further found that it was "undisputed" that the alleged oral agreements were "never fully executed" as required under Oklahoma law, and therefore the alleged oral agreement could not operate to alter the terms of the loan agreement.

Consequently, the ruling of the Tenth Circuit is not what the Petitioner suggests, and furthermore, appropriately applies Oklahoma law.

CONCLUSION

Based on the above, The Petition for Writ of Certiorari should be and must be denied.

Respectfully submitted,

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